

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA
For the Period
April 1, 1952
Through June 30, 1952
Volume No. 67

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1952, through June 30, 1952, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,
Attorney General.

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Si Garrett

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OPINIONS

April 2, 1952

Hon. Estes R. Flynt

Tax Assessor

Lauderdale County

Florence, Alabama

Tax Assessor — Ad Valorem Taxes — Exemptions — Motor Vehicles.

The tax assessor has no authority to exempt from ad valorem tax any self-propelled motor vehicle operating on the public roads and highways of this State, the owner of said vehicle having established a permanent residence in the county in which he assesses his vehicle, and the previous year's tax having been issued in this State.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 22, 1951, is as follows:

"Does the Tax Assessor have authority to exempt from ad valorem tax and self-propelled motor vehicle operating on the public roads and highways of this state, the owner of said vehicle having established a permanent residence in the county in which he assesses his vehicle and the previous year's tag having been issued in this state."

I also have your letter of May 22, 1951, which is as follows:

"It has been called to my attention that the Tax Assessor in a nearby county is exempting all old model automobiles and trucks from ad valorem tax.

"Some of the taxpayers in my county are insisting that they be accorded this same privilege.

"I am therefore requesting of you an official opinion as to the legality of such exemptions, which request is herewith enclosed."

There is no authority for the exemption about which you inquire.

Under the provisions of Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, it is the duty of the tax assessor to ascertain whether or not ad valorem tax is due upon a motor vehicle for which application is being made for a license tag, and to certify if it be a fact, that no ad valorem tax is due thereon. Biennial Report of Attorney General, 1936-1938, page 552.

Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 953, General and Local Acts 1951, page 1626, sets forth the property which shall be exempted from ad valorem taxation. There is no provision for the exemption of self-propelled motor vehicles operating on the public roads and

highways of this state. Thus, the tax assessor does not have authority to exempt these vehicles from ad valorem taxation.

I am informed that tax assessors in some counties, in arriving at the value of an automobile which is quite old, sometimes determine that such vehicle has little, if any, value. Such a valuation made by the tax assessor would, of course, tend to make the amount of tax due insignificant. However, there is no authority of law for granting an exemption if the automobile has any value whatsoever, although the tax assessor may find that the value of the automobile assessed for taxes is very low due to the age of the vehicle. He is not authorized to exempt the vehicle from taxation.

Yours very truly,

SI GARRETT

Attorney General

April 8, 1952

Hon. W. J. Terry

State Superintendent of Education

C A P I T O L

County Boards of Education — Schools.

When pupils attending public schools of the county are assigned to a particular school, school authorities cannot assess a charge for transporting such pupils to that school, even though such pupils by-pass another school which is nearer to their homes.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of November 27, 1951, is as follows:

"Attached is a copy of a letter from Mr. C. S. English, Superintendent of Education, Crenshaw County, relative to his board of education charging fees for pupils to ride county-owned school buses. It is my understanding that Mr. English desires an official opinion from you as to whether it would be legal for his board of education to charge fees for pupils to ride a county-owned bus when such pupils by-pass a school where their grades are taught in order to attend another school.

"I shall appreciate it if you will give me an official ruling relatives to this matter."

I am of the opinion that your question should be answered in the negative.

In a previous opinion of this office, it was concluded that a child must attend the school properly designated by the county board of education pursuant to its rules and regulations and in conformity with established attendance districts; and if not attending that school the child may be transferred to the designated school, no responsibility resting upon the board to furnish transportation to any other school. Quarterly Report of Attorney General, Vol. 56, page 28.

Title 52, Section 142, Code of Alabama 1940, prohibits school authorities from collecting incidental fees. Biennial Report of Attorney General, 1936-1938, page 475. Pupils who by-pass a school where their grades are taught can be transferred to the nearer school. While there is no obligation on the part of school authorities to assign and transport pupils to the more distant school, so long as the pupils are assigned to that school, there is no authority to charge for transportation to that school. See Title 52, Section 76, Code of Alabama 1940. A charge for such transportation would, in my judgment, constitute an incidental fee prohibited by Section 142, supra. Cf. Biennial Report of Attorney General, 1928-1930, pages 40 and 61.

Very truly yours,

SI GARRETT

Attorney General

April 8, 1952

Honorable W. B. Mills, Jr.

Executive Director

Greater Gadsden Housing Authority

Sixth Street at Tuscaloosa Avenue

Etowah County

Gadsden, Alabama

Municipalities — Housing Authorities — Department of Finance.

Municipal housing authorities organized under the provisions of Title 25, Chapter 2, Code of Alabama 1940, as amended, may issue bonds without the approval of the Director of Finance.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, dated January 14, 1952, is as follows:

"Greater Gadsden Housing Authority is a Municipal Housing Authority operating under the provisions of 1940 Code of Alabama, Title 25, Chapter 2. The Authority, in connection with the performance of its governmental functions, has from time to time issued bonds or other evidence of indebtedness.

"The Public Housing Administration has raised the question of whether or not it is necessary for us, as a Municipal Housing Authority to obtain consent of the Department of Finance before issuing or selling any such bonds.

"Therefore, we wish to propound to you and obtain your formal opinion on the following question:

"Is it necessary for Municipal Housing Authorities to obtain the consent of the Department of Finance to the issuance and sale of bonds or other evidences of indebtedness of any such Authority?

"Prior to the 1951 regular session of the Alabama Legislature, a Municipal Housing Authority was required to obtain such consent of the Department of Finance by two Sections of the 1940 Code of Alabama viz: Title 25, Section 13, and Title 55, Section 155.

"You will note that the former Section deals specifically with the subject of Municipal Housing Authorities, whereas, the latter Section has to do with bridge Commission, REAs, electric membership corporations, power districts, and improvement authorities, as well as Housing Authorities.

"By Act No. 193 of the 1951 Legislature, said Title 25, Section 13, (and Section 39 dealing with County Housing Authorities) was repealed. The repeal of this Section, to us clearly manifested legislative intent to relieve Municipal Housing Authorities of the duty of obtaining consent of the Department of Finance before issuing bonds. If such meaning be not given to the action of the Legislature in passing Act 193, then its action in so doing was entirely ineffectual. For Act 193 to have any application or field of operation whatsoever, it must be construed as, in effect, taking Housing Authorities out from under the provisions of Title 55, Section 155.

"Since the last expression of the Legislature on this subject is Act 193 of the 1951 Legislature, it seems manifest to us that the Legislature intended, by passing said Act, to relieve Municipal and County Housing Authorities of the duty of obtaining consent of the Department of Finance before issuing bonds or other evidences of indebtedness.

"We will thank you to furnish us with your opinion on this question in order that we may satisfy the requirements of the Public Housing Administration."

Title 25, Section 12, Code of Alabama 1940, enumerates the powers of municipal housing authorities. One of the powers listed is the power "to borrow money upon its bonds, notes, warrants, debentures or other evidences of indebtedness and to secure the same by pledges of its revenue. . ."

Prior to the 1951 session of the legislature, Title 25, Section 13, Code of Alabama 1940, provided that no bonds or other evidence of indebtedness may be issued by municipal housing authorities without the consent of the Department of Finance. This section, however, was expressly repealed by Act No. 193, General and Local Acts 1951, page 456.

Title 55, Section 155, Code of Alabama 1940, formerly provided that the consent of the Director of Finance or chief of the division of local finance

was a condition precedent to the issuance of bonds or other evidence of indebtedness by certain groups, including housing authorities. Section 155, supra, was amended by Act No. 191, General and Local Acts 1951, page 454, by eliminating the chief of the division of local finance and by adding the following proviso:

" . . . provided, however, the provisions of this Act shall not apply to any bonds or other evidence of indebtedness issued by any town, city or municipality, or any agencies, bureaus or commissions thereof."

A municipal housing authority is an administrative agency of a city.
In re Opinions of the Justices, 235 Ala. 485, 179 So. 535.

In view of the repeal of Section 13, supra, and the above-quoted proviso embodied in Section 155, as amended, supra, it is my opinion that municipal housing authorities organized under the provisions of Title 25, Chapter 2, Code of Alabama 1940, as amended, may now issue bonds without the consent of the Director of Finance.

Yours very truly,

SI GARRETT,
Attorney General

April 8, 1952

Honorable L. B. Sullivan
Director of Public Safety
P. O. Box 1471
Montgomery 2, Alabama

Public Safety Department — Motor Vehicle Responsibility Act.

1. The provisions of Act No. 276, General Acts 1947, page 121, insofar as they relate to accidents, or judgments arising therefrom, or violations of the motor vehicle laws of this State occurring prior to January 1, 1952, were not repealed by the provisions of Act No. 704, General and Local Acts 1951, page 1224.

2. Act No. 276, General Acts 1947, page 121, is the appropriate statute under which action should be taken for the suspension of the operator's license and registration plates caused by the failure to satisfy a judgement resulting from an accident occurring prior to January 1, 1952.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date March 1952, is as follows:

"It will be greatly appreciated if you will render me an official opinion covering the following:

"On March 13, 1951, a judgement was rendered in a court of proper jurisdiction growing out of a motor vehicle accident which occurred on March 12, 1950. At the time that this judgment was rendered Section 4 of Act 276, 1947, Page 121, not codified, would require the Director of Public Safety to suspend the operator's license and all registration certificates of the person against whom the judgement was rendered who had failed to satisfy said judgment.

"The certified copy of judgment that is required under Subsection D of Section 4 of the above numbered Act was not submitted to this office until February 18, 1952. Act 704 of the 1951 Session of the Legislature repealed Act 276 of the Regular Session of the 1947 Legislature when it became effective January 1, 1952. The question that I want to determine is whether I should take action under Act 276 of the Regular Session of 1947 Legislature or under Act 704 of the 1951 Regular Session of the Legislature, or whether action under either one of these Acts would be proper under the above circumstances.

"No doubt, we are going to be faced with a number of cases of similar nature."

In answer to your inquiry your attention is invited to the following sections of Act No. 704, General and Local Acts 1951, page 1224.

"Section 36—(Repeal of Existing Laws). This Act shall in no respect be considered as a repeal of the State Motor Vehicle Laws but shall be construed as supplemental thereto.

"Act No. 276, approved August 6, 1947, Acts 1947, Page 121, known as the Alabama Motor Vehicle Responsibility Act, is hereby repealed except with respect to any accident, or judgment arising therefrom, or violation of the motor vehicle laws of this State, occurring prior to the effective date of this Act. All laws and parts of laws in conflict herewith are to the extent of any such conflict hereby repealed.

"Section 37—(Past Application of Act) This Act shall not apply with respect to any accident, or judgment arising therefrom, or violation of the motor vehicle laws of this State, occurring prior to the effective date of this Act."

"Section 44—(Effective Date of Act) This Act shall become effective on January 1, 1952."

Section 37, *supra*, definitely limits the application of Act No. 704, in respects pertinent to the instant inquiry, to accidents occurring on or after January 1, 1952. The provisions of Act No. 704, *supra*, could not then apply to the accident under consideration which occurred on March 12, 1950.

The general rule is that where a statute is repealed without a saving clause the repealed statute in regard to its operative effect, is considered as if it had never existed. *Ex parte McCardle*, 7 Wall (U. S.) 506, 19 L. Ed. 264; *Mahoney v. State*, 5 Wyo, 520, 42 P. 13.

Frequently, however, there are express saving clauses in repealing statutes, which continue the law in force as to all cases to which they apply. **Common-**

wealth v. Bennett, 108 Mass. 30; **Henley v. Myers**, 76 Kan. 723, 93 P. 163. Section 36, *supra*, is such a saving clause.

It is to be noted that the provisions of Section 36, *supra*, expressly except from repeal matters in respect to an accident or judgments arising therefrom, occurring prior to January 1, 1952. This exception continues in force the provisions of Act No. 276, General Acts 1947, page 121, in respects to accidents, or judgments arising therefrom, which occurred before January 1, 1952.

The suspension of the operator's license and registration plates, caused by the failure to satisfy a judgment resulting from an accident, seems clearly within the exception in Section 36, *supra*.

It is, therefore, my opinion that the provisions of Act No. 276, *supra*, insofar as they relate to the suspension of the operator's license and registration plates caused by the failure to satisfy a judgment resulting from an accident occurring prior to January 1, 1952, are still in effect. This being so, Act No. 276, *supra*, is the appropriate statute under which action should be taken for the suspension of the operator's license and registration plates caused by the failure to satisfy a judgment resulting from an accident which occurred to January 1, 1952.

Yours very truly,

SI GARRETT

Attorney General

April 8, 1952

Hon. Douglas C. Martinson

Judge, Juvenile Court

Madison County

Huntsville, Alabama

Madison County—Clerks of Inferior Courts—Department of Public Welfare—Juvenile Courts.

1. The Judge of the Inferior Court of Huntsville has authority to appoint a clerk of said court, whose salary is paid by the county governing body.

2. When juvenile jurisdiction has been conferred upon a special inferior court by local law, Title 13, Section 380, Code of Alabama 1940, as amended by Act No. 583, General and Local Acts 1951, page 1018, allowing the juvenile court to appoint a clerk of the probate court as clerk of the juvenile court, is not applicable.

3. The Judge of the Inferior Court of Huntsville having juvenile and domestic relations jurisdiction, has authority to appoint a full-time probation officer, whose salary is to be paid by the county governing body.

4. The county department of public welfare may be appointed to perform the functions of a probation officer for the Inferior Court of Huntsville in cases involving children who are dependent, neglected, delinquent, or otherwise handicapped, but not in other cases.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated December 17, 1951, is as follows:

**"IN RE: JUVENILE COURT, MADISON COUNTY, ALABAMA,
PROBATION OFFICER**

"As Judge of the Juvenile Court of Madison County, Alabama, I request your opinion on the following questions:

"1. Title 52, Section 316, Code of Alabama 1940, provides as follows:

"**'JUVENILE COURT JURISDICTION.**—The juvenile court of the county shall have original and exclusive jurisdiction of all prosecutions or proceedings arising under the provisions of this chapter against or concerning any parent, guardian, or other person having charge or control of a child, or against or concerning any child or other person for the purpose of enforcing the provisions of this chapter and effecting its objects, and all provisions of chapter 7 of title 13 shall apply to prosecution or proceedings arising under the provision and terms of this chapter.'

"Under this section and chapter eleven (11) school attendance, is it the duty of the welfare department to act as probation officer for this court where said court has no duly appointed probation officer?

"2. Since your opinion dated November 29, 1951, had the effect of ruling that the Juvenile Court of Madison County, also had jurisdiction of all cases arising out of Article Three (3), Title 34, Section 89 through 104, Code of Alabama, and Section 102 of this Title provides for probation officers, is it the duty of the welfare department to act as probation officer for this court where said court has no duly appointed probation officer?

"3. Does the Judge of the Juvenile Court of Madison County, Alabama, have the authority to appoint a full time probation officer, and if your answer is yes, who pays the salary of said probation officer?

"4. Under Title 13, Section 380, Code of Alabama, which reads as follows:

"**'CLERKS.**—The judge of the juvenile court may appoint as clerk of the court any probation officer or a clerk of the probate court. The judge may also appoint as deputy clerk of the court any other probation officer or clerk of the probate court. Such clerk and deputies shall receive no additional remuneration for their services to the juvenile court.'

"Is it contemplated that the Judge of the Juvenile Court has the authority to appoint a clerk working in the Probate Court as clerk of this court?"

Your inquiry involves two separate matters. Questions Nos. 1, 2 and 3 involve the appointment of a probation officer for the Inferior Court of Huntsville, which court has juvenile court jurisdiction and jurisdiction over certain domestic relations (opinion to you under date of November 29, 1951), while Question No. 4 involves the appointment of a clerk for the said Inferior Court of Huntsville.

Answering your fourth inquiry first, it is my opinion that the Judge of the Inferior Court of Huntsville has authority to appoint a clerk of the court who is the clerk of the court in reference to all matters over which the court has jurisdiction, including juvenile and domestic relations matters, and that Title 12, Section 380, Code of Alabama 1940, as amended by Act No. 574, General and Local Acts 1949, page 905, is inapplicable. The Clerk serves at the pleasure of the judge, and his salary is paid by the county governing body. Sections 9 and 15, Act No. 213, Local Acts 1911, page 215, as amended by Act No. 77, Local Acts 1931, page 19.

Section 9, as amended, *supra*, provides:

"That a clerk of said court may, at the discretion of the Judge of said court, be appointed by said Judge, whose salary shall not exceed seventy-five dollars per month, payable at the end of each month, out of the county treasury, and said clerk to be subject to removal at the will of the Judge. Before entering upon the duties of his office, such clerk shall give bond with sureties, and in such amount as may be fixed by the Judge appointing him, not less than five hundred dollars, which bond shall be payable, conditioned, filed and recorded as required by law in respect to Justices of the Peace. If at any time there should be no clerk of said court, it is hereby made the duty of the Judge thereof to do and perform all the Acts herein required to be done by the clerk."

Furthermore, Act No. 17, General and Local Acts 1951, page 219, raises the maximum salary of the clerk to one hundred fifty dollars per month. Local Act No. 213, as amended, *supra*, therefore, provides for a clerk and the payment of his salary. This fact has been recognized by the Supreme Court. *Sanders v. Young*, 220 Ala. 94, 124 So. 225.

In my opinion, Title 13, Section 380, Code of Alabama 1940, as amended by Act No. 583, General and Local Acts 1951, page 1018, so far as the Inferior Court of Huntsville is concerned, does not have the meaning referred to in your inquiry. Section 390, as amended, *supra*, allows the judge of a juvenile court to appoint as clerk of the juvenile court any probation officer or a clerk of the probate court. This section further allows a judge of a juvenile court to appoint as deputy clerk of the juvenile court any other probation officer or any other clerk of the probate court. These clerks do not receive compensation for their services, except in certain counties.

The probate judge, in the absence of a special or local law establishing a juvenile or special domestic relations court, is the judge of the juvenile court. Title 13, Section 351, Code of Alabama 1940. The laws relating to such juvenile courts allow the probate judge to appoint one of his probate clerks as clerk of the juvenile court. Section 380, as amended, *supra*. This is entirely logical and reasonable. On the other hand, when there is a juvenile and domestic relations court created by special or local act of the Legislature, as is the case in Madison County, I do not believe that the Legislature intended that a court presided over by a judge, who is not the probate judge, could require the services of an employee of the probate court as clerk. This is particularly true when the local act creating the juvenile court makes full provision for the appointment of a clerk. You are advised, therefore, that Sec-

tion 380, as amended, *supra*, is not applicable to the Inferior Court of Huntsville.

In connection with your inquiries Nos. 1, 2 and 3, involving probation officers for the Inferior Court of Huntsville, it is my opinion that the Judge of the Juvenile Court of Madison County, who is the same person as the Judge of the Inferior Court of Huntsville, has the authority to appoint a full-time probation officer, who must be paid by the county governing body. Of course, the necessity of such an appointment must be concurred in by the advisory board of the juvenile court (Title 13, Section 375, Code of Alabama 1940), or the county board of public welfare, if there be no such advisory board. Title 13, Section 360, Code of Alabama 1940.

This office has heretofore held that the Inferior Court of Huntsville has jurisdiction over juvenile matters and matters concerning domestic relations, provided for in Title 13, Section 350, et seq., and Title 34, Section 89, et seq., Code of Alabama 1940. Opinion addressed to you under date of November 29, 1951 (Ms.). Act No. 460, General and Local Acts 1951, page 820, which confers this jurisdiction upon the Inferior Court of Huntsville, provides in Section 1 thereof, as follows:

"There is hereby conferred on the Inferior Court of Huntsville all the jurisdiction, powers, authority and duties which are conferred on juvenile courts by Chapter 7 of Title 13 of the Code of Alabama (1940) or by any other laws of the State, and such jurisdiction, powers, authority and duties are hereby withdrawn from the Juvenile Court of Madison County."

This section of the local law, *supra*, must be "construed with the provisions of the general law that have application." *Sanders v. Young*, *supra*. One of the provisions of the general law having application here is Section 360, *supra*, authorizing the juvenile court to appoint probation officers. The salary of such probation officer is paid by the county and fixed in accordance with that section. See Quarterly Report of Attorney General, Vol. 39, page 10.

The answer to your third inquiry, stating that the Inferior Court of Huntsville has authority to appoint a full-time probation officer, may dispose of your Question Nos. 1 and 2, which questions ask whether or not it is the duty of the department of public welfare to provide a probation officer in cases arising under the school attendance law (Title 52, Sections 297-321, Code of Alabama 1940), and the laws relating to domestic relations (Title 34, Sections 89-104, Code of Alabama 1940).

Under certain circumstances, the county department of public welfare, through its director and assistants, may be appointed by a court of competent jurisdiction to perform, under the supervision of the court, the functions of a probation officer. Section 8 of Act No. 703, General and Local Acts 1951, page 1211. It is my opinion, however, that the welfare department should not be so appointed to perform the functions of a probation officer unless there is a related issue in the particular case involving a dependent, neglected, or delinquent, or otherwise handicapped child. Section 8 of Act No. 703, *supra*. When there is a question before the Inferior Court of Huntsville, involving whether or not a child is dependent, neglected, or delinquent, or otherwise handicapped, it would be proper for the judge of said court to designate the county department of public welfare to perform the duties of probation officer in that particular case, and it would be the duty of the county welfare department to perform such functions. When, however, there is no question of whether or not the child is dependent, neglected, delinquent, or otherwise handicapped; for example, when mere failure to attend school is involved, under the provisions of Title 52, Section 297, et seq., Code of Alabama

1940, the court may rely upon the services of the attendance officer appointed by the board of education. See Title 52, Sections 312-314, Code of Alabama 1940. These officers are supposed to be appointed by the board of education and paid by the board of education. Title 52, Section 315, Code of Alabama 1940. If there is a regularly appointed probation officer for the Inferior Court of Huntsville, he may perform his duties in connection with questions relating to mere failure of children to attend school. Section 312, *supra*. However, the welfare department should not be appointed probation officers in cases relating solely to a child's failure to attend school.

Your Question No. 2 relates to the duty of the county welfare department to act as probation officer in cases arising under Title 34, Section 89, *et seq.*, *supra*. Such cases may or may not involve the dependency, neglect, or delinquency of children. If such cases do involve the dependency, neglect, or delinquency of children, it is my opinion that the welfare department may be properly appointed to serve as probation officer, under the provisions of Title 34, Section 102, Code of Alabama 1940. You will note, however, that Section 102, *supra*, allows a person so appointed to decline to act as probation officer in such cases if such duties interfere with the performance of his other duties. Section 102, *supra*. Of course, a full-time probation officer appointed by the court could not so decline; neither could the county department of public welfare if a question involving the dependency, neglect or delinquency of a child is involved.

In summary, therefore, you are advised that the Judge of the Inferior Court of Huntsville has authority not only to appoint a clerk for his court, but also has authority to appoint a full-time probation officer. Both salaries are paid out of the county treasury. If there is no probation officer so appointed, the welfare department may be required by the court to perform the functions of the probation officer where there is a question involving a child's dependency, neglect, or delinquency.

Yours very truly,

SI GARRETT

Attorney General

April 8, 1952

Honorable L. B. Sullivan, Director

Department of Public Safety

Highway Building

Montgomery, Alabama

Public Safety Department—Motor Vehicles—Speed.

1. A pick-up truck is a motor truck, and as such is subject to the speed restriction for motor trucks set out in Title 36, Section 5, Code of Alabama 1940.

2. A panel-body truck is a motor truck, and as such is subject to the speed restriction for motor trucks set out in Title 36, Section 5, Code of Alabama 1940.

3. A station wagon kept for private use and designed primarily for transportation of passengers is a passenger automobile, and as such is not subject to the speed restrictions for motor trucks set out in Title 36, Section 5, Code of Alabama 1940.

4. A jeep as such, without modification, is a passenger car, and is not subject to the speed restriction for motor trucks set out in Title 36, Section 5, Code of Alabama 1940.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion bearing date December 18, 1951, is as follows:

"In the effort of this agency to enforce the speed restrictions contained in Section 5, Title 36, Code of Alabama 1940, our officers find that a difference of opinion exists as to just what vehicles are governed by the following provision of Section 5:

"No person shall operate any motor truck or motor vehicle used primarily for the transportation of property, or any semi-trailer truck on any highway outside cities or incorporated towns at a greater rate of speed than forty miles per hour and inside the limits of cities and incorporated towns, the maximum speed limit shall be twenty miles per hour."

"Please give us your opinion in answer to the following questions so that we may clarify this issue for our officers who are charged with the duty of enforcing this section.

"1. Does the restriction on speed contained in the above-quoted provision of Section 5, Title 36, Code of Alabama 1940, apply to:

- (a) Pick-up trucks?
- (b) Panel-body trucks?
- (c) Station wagons?
- (d) Jeeps?

"In view of the present drive to make Alabama roads safer by strictly enforcing traffic laws and the ever increasing number of vehicles of these types on our highways, we shall appreciate your usual prompt reply."

In answering your inquiry your attention is invited to Title 36, Section 1, Code of Alabama 1940, as amended by Act No. 517, General and Local Acts 1949, page 754, which defines a motor truck, for the purpose of the statute under consideration, as follows:

"Section 1. DEFINITIONS.—The following words and phrases when used in this title shall for the purpose of this title have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning.

"(20) 'Motor Truck.' Any motor-prepelled vehicle designed for carrying freight or merchandise and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles designed primarily for passenger transportation, but equipped with frames, racks or bodies having a load capacity not exceeding one thousand pounds."

For the motor vehicles under construction to be governed by the speed restriction in Title 36, Section 5, Code of Alabama 1940, set out in your inquiry, it is necessary that they come within the definition of a motor truck as above defined, or that they be motor vehicles used primarily for the transportation of property.

The answers to your inquiries must then necessarily be determined by the facts in each instance, but unless the contrary is shown in regard to the vehicle involved the following answers must prevail.

Question 1 (a) should be answered in the affirmative. In my opinion a pick-up truck is a motor vehicle designed primarily for the transportation of property, and as such is subject to the speed restriction as set out in Section 5, *supra*.

For like holdings under similar statutes see *Pollard v. Stansell*, 169 Miss. 136, 152 So. 646; *H. W. Bass Drilling Co. v. Ray*, 101 F. 2d 316, (N. Mex.), C. C. A., 10th.

Question 1 (b) of your inquiry should also be answered in the affirmative.

It is to be noted that the definition of a motor truck for license purposes, as set out in Title 51, Section 692, Code of Alabama 1940, is practically the same as the definition of a motor truck in Section 1, as amended, *supra*. In an opinion of this office, relating to a vehicle *similar* to panel-body trucks, it was decided that such a vehicle was a truck within the definition of "motor truck" as defined in Section 692, *supra*, and required a truck license. Quarterly Report of Attorney General, Vol. 4, page 173. See also Biennial Report of Attorney General 1936-38, page 413.

I am, therefore, of the opinion that a panel-body truck is a vehicle designed primarily for the transportation of property, and as such is subject to the speed restriction provided for in Section 5, *supra*.

Questions 1 (c) and 1 (d) of your inquiry may be answered together, and should be answered in the negative.

"Jeeps as such" have been held to be passenger automobiles. Quarterly Report of Attorney General, Vol. 49, page 77.

Station wagons have been classified as motor trucks. Quarterly Report of Attorney General, Vol. 49, page 77; Quarterly Report of Attorney General, Vol. 17, page 172. This classification has now been changed in part at least, and unless the contrary is shown a station wagon is now classified as a passenger automobile. This change was brought about by the provisions of Act No. 976, General and Local Acts 1951, page 1650, which provides in pertinent part as follows:

"Section 1. Station wagons, jeeps, and similar motor vehicles which are kept for private use and are designed primarily for the transportation of passengers shall be taxed, rated, and classified on the same basis as

other passenger automobiles kept for private use of the same size or weight; and where used in any statute, rule, regulation, or order, the term 'passenger automobile' or 'passenger motor vehicle' shall include station wagons, jeeps, and similar vehicles which are kept for private use as passenger cars, unless a contrary meaning is obvious.

It is to be noted that the provisions of this section apply only to station wagons, jeeps, and similar vehicles **kept for private use and designed primarily for the transportation of passengers**. The exact classification of a vehicle will depend on the facts in each instance, and unless the provisions of Act No. 976, supra, are complied with a station wagon is still to be classified as a motor truck, and the speed governed according to the provisions of Section 5, supra.

It is, therefore, my opinion that a station wagon or jeep kept for private use, and designed primarily for the transportation of passengers is a passenger automobile and is not subject to the speed restrictions for motor trucks as set out in Section 5, supra.

Yours very truly,

SI GARRETT

Attorney General

April 9, 1952

Hon. J. W. Hamilton

Tax Collector

Jefferson County

Birmingham 3, Alabama

Tax Sales — Taxation — Municipalities — Judges of Probate —
Ad Valorem Taxes — Redemption.

1. It is the duty of the judge of probate to take appropriate action to enforce the collection of delinquent property taxes where only municipal taxes are due, pursuant to Title 37, Sections 698-732, Code of Alabama 1940.

2. Redemption of such property should be handled by the judge of probate.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of February 22, 1952, is as follows:

"On September 13, 1949, there was held in this County an election, for the purpose of determining whether or not, by the vote of the people,

certain property adjacent to the corporate limits of the City of Birmingham should be annexed to the City of Birmingham. A majority of the voters voted to annex said adjacent property to the City of Birmingham. Legal action was taken to declare the election void and such action was finally adjudicated on March 1, 1951, when the Supreme Court held the election legal.

"During the interim between the date of the election and the date that the Supreme Court handed down its decision, the state and county taxes on the properties annexed to the City of Birmingham became due and were paid. Subsequent to the date that the Supreme Court ruled in the matter, the Tax Assessor made an assessment against the various properties located in the annexed territory for only City of Birmingham tax, for 1951, which under regular procedure would have been collected with the 1950 state and county taxes.

"There will be a number of those assessments for only City of Birmingham tax that will be unpaid at the close of this year, and which I, as Tax Collector will have to dispose of in some manner. I am at a loss as to just what the legal procedure would be on my part, to clear my records of any unpaid accounts of this nature at the close of the present tax year. I ask that you give me your opinion on the following questions involved in a tax sale for delinquent taxes.

"1. Would the Judge of Probate have the legal right to cite delinquent tax payers, to appear in his Court, to show why a decree should not be rendered directing me, as Tax Collector, to proceed to sell property for delinquent taxes, where municipal taxes only are due?

"2 If your opinion on this question is in the affirmative, would he then have the legal right to issue decree, directing me as Tax Collector, to proceed to advertise and sell property for delinquent municipal taxes?

"If your opinion is negative, how then should I dispose of such accounts at the closing of this tax year?

"4. In the event that you hold that I should follow the regular procedure prescribed by law, in advertising and selling property for delinquent state and county taxes, and the City of Birmingham became the purchaser of said annexed properties at my tax sale, should the redemption of same be handled by the Judge of Probate, or the City Comptroller of the City of Birmingham? The reason for this question is, that it has been held by the State Department of Revenue, that the Judge of Probate does not have the right to bid in the name of the State, on property where there is no State tax involved.

"In the event that under your opinion, I am required to sell said annexed properties, there will be involved a large amount of printing, on docket sheets, sale certificates, etc., which require a considerable length of time to have done. Therefore, I will greatly appreciate your opinion at your earliest convenience."

In answer to your first and second inquiries, it is the duty of the probate judge to cite delinquent taxpayers to appear before him and show cause why a decree of sale of the property involved should not be rendered, and likewise, upon a proper finding, to issue said decree.

By virtue of Section 701 of Title 37, Code of Alabama 1940, the Tax Collector of Jefferson County collects all property taxes for the City of Birmingham at the same time and in the same manner and under the same laws that State and county taxes are collected. (The optional method of collecting municipal taxes, as prescribed in Title 37, Sections 698-732, Code of Alabama 1940, obtains in the City of Birmingham. Act No. 155, General Acts 1911, page 130; *Johnson v. State*, 245 Ala. 499, 17 So. 2d. 662.)

Title 37, Section 730, Code of Alabama 1940, provides as follows:

"§ 730. Laws now in force.—All laws now in force or hereafter enacted in regard to the collection of state and county taxes and procedure, with reference thereto, and the enforcement of collection shall apply to and be in force as to such municipal taxes, except as such laws are changed by or in conflict with the provisions of this article and the county tax collector shall collect or enforce the collection of such municipal taxes at the same time, in the same manner and way, and as a part of one and the same collection as the collection of state and county taxes and all procedure incident to or in any wise connected with the collection of state and county taxes shall be equally applicable to the collection of said municipal taxes and all such municipal taxes shall be collected in the same way and in the same proceedings as state and county taxes."

Title 51, Sections 78-87, Code of Alabama 1940, (Sections 80, 81, and 84 have been amended in respects not here material) dealing with the assessment and collection of taxes, are applicable in Jefferson County. Section 86 of this Title provides that it shall be the duty of the tax collector to furnish the probate judge a list of all property on which taxes are delinquent. On receiving said list the probate judge must give notice by publication to the delinquent taxpayers, and order them to appear and show cause why a decree of sale of the property should not be made. Section 87 of this Title provides for the issuance of a decree of sale by the probate judge upon failure of the taxpayer to present a valid defense.

Title 37, Section 718, Code of Alabama 1940, likewise provides that the decree for tax sales rendered by the probate judge under the provisions of law in regard to State and county taxes shall embrace taxes due in municipalities.

No exemption to the probate judge's duty occurs merely because the delinquency involves municipal taxes only. The purpose of the above quoted statute is to adopt for the municipality the statutory taxation machinery already available for the State and county, for reasons of economy and convenience. *City of Opp v. Brogden*, 236 Ala. 180, 181 So. 752.

In view of the foregoing, it is unnecessary to answer your third inquiry.

Your fourth inquiry involves property on which only municipal taxes are delinquent and which has been offered for sale as outlined above, and which, in the absence of other offers, has been bid in by the city. This question is answered by Title 37, Section 724, Code of Alabama 1940. The question of the authority of the probate judge to bid in the name of the State at the sale of property upon which no State tax is due is not here involved. Thus, there is no conflict between the conclusions reached herein and the ruling of the Department of Revenue to which you refer.

When such land is redeemed, the provisions of Section 724, *supra*, be-

come applicable. This section prescribes the method by which the probate judge is to remit the redemption money. It provides that, in addition to remitting to the State and county treasurers their respective shares, the proportion, if any, of the money received from the sale which belongs to the municipality shall be paid by the probate judge to the treasurer or other person designated by the governing body of such municipality. Therefore, the same procedure should be followed by the probate judge even though no part of the redemption money is payable to the State or county.

I conclude, thus, that the redemption procedure in the situation outlined in your fourth inquiry should be handled by the probate judge.

Yours very truly,

SI GARRETT

Attorney General

April 10, 1952

Hon. Ed E. Reid

Executive Director

Alabama League of Municipalities
Montgomery, Alabama

Motor Vehicles — Municipalities — Insurance.

1. The provisions of Act No. 704, General and Local Acts 1951, page 1224, known as the Motor Vehicle Safety-Responsibility Act, are not applicable to vehicles owned by the United States, the State of Alabama, or any political subdivision thereof or municipality therein.

2. Officers and employees of municipalities are subject to the provisions of Act No. 704, supra, when involved in an accident while driving vehicles **not** owned by such governmental units.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of January 8, 1952, is as follows:

"Section 33 of Act No. 704, Acts of Alabama 1951 Session, page 1224, and effective January 1, 1952 (The Motor Vehicle Safety-Responsibility Act), provides in pertinent part:

"This Act shall not apply with respect to any motor vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein; . . ."

"In view of this exception to the provisions of this Act, I respectfully request your opinion as to whether or not the provisions of said Act apply in any manner to an officer or employee of a municipality driving a motor vehicle owned by said municipality, or one which is privately owned by such officer or employee.

"For such assistance as it may be to you in answering this request. I enclose a letter in regard to this matter which I recently received from Hon. Mayer U. Newfield, Assistant City Attorney of Birmingham."

Section 4 of Act No. 704, General and Local Acts 1951, page 1224, known as the Motor Vehicle Safety-Responsibility Act, requires that a report in writing to the Director of Public Safety be made by the "operator of every motor vehicle which is in any manner involved in an accident within this State, in which any person is killed or injured or in which damage to the property of any one person, including himself, in excess of fifty dollars is sustained."

Section 5 of the Act requires that after the receipt of such report the Director shall suspend the license of each operator and the registration of each owner of a motor vehicle involved in such accident and not otherwise released from liability, unless such operator or owner shall deposit security in a sum to be determined by the Director. Section 5(c) provides for certain exceptions to the requirement of posting security. An exemption is granted to owners or operators who have in effect a liability insurance policy which would cover the damages, up to a specified amount, resulting from the accident. An exemption is also granted to persons who qualify as "self-insurers" under Section 34 of the Act. Section 6 provides for further exceptions to the requirements as to security and suspension.

Section 33 of the Act provides in part as follows:

"This Act shall not apply with respect to any motor vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein; . . ."

This exemption obtains only when the motor vehicle involved in the accident is owned by the United States, the State of Alabama, or one of its governmental subdivisions. If such a vehicle is involved in an accident, clearly none of the provisions of the Act apply. This is so, regardless of who is operating the government vehicle at the time of the accident and irrespective of the purpose for which the vehicle is being used.

The purpose of the exception of government-owned vehicles provided for by Section 33, *supra*, is presumably to prevent the hindrance or embarrassment to governmental units, in the performance of their functions, which would result from the suspension provisions of the Act. The wisdom and efficacy of such an exception are questions which the Legislature must be presumed to have considered; the language of this section is clear-cut. The exception is comparable to the immunity, enjoyed by governmental units, from liability for the torts of government employees when committed in the performance of governmental functions. The Act does not, of course, concern itself with the personal liability of government officers and employees. Section 33, *supra*, does, however, prevent what would otherwise, under the Act, be a loss to the government of the services of vehicles which that government owns.

Similar exceptions for government-owned vehicles are provided for in the motor vehicle responsibility laws enacted by other states. See, for ex-

ample, Annotated Laws of Massachusetts, Chap. 90, Sec. 1A, as amended; Purdon's Pennsylvania Statutes Annotated, Title 75, Sec. 1277.33; Wisconsin Statutes 1949, Sec. 85.09(33).

When accidents involve vehicles which are privately owned by officers or employees of the United States, the State of Alabama, or its subdivisions, there is no exception from the terms and operation of the Act. The requirement of posting security and the sanction of suspending licenses and registrations apply, therefore, to such officers and employees when driving private cars. The purpose of the Act—"to eliminate the reckless and irresponsible driver of motor vehicles from the highways of the State of Alabama"—is partially thwarted if a class of persons is permitted to escape its provisions merely because their occupation is working for the government. The Act is not concerned with occupations.

The ordinary policy of automobile liability insurance runs to the car itself. So far as their private cars are concerned, government officers and employees may be expected to make provisions for exempting themselves from the security and suspension requirements of the Act by the purchase of insurance or in any manner provided by the Act.

You are advised, therefore, that the provisions of the Motor Vehicle Safety-Responsibility Act apply to officers and employees of municipalities except when such persons are driving vehicles which are owned by "the United States, this State or any political subdivision of this State or any municipality therein."

Yours very truly,

SI GARRETT

Attorney General

April 11, 1952

Hon. R. C. Brown
Superintendent

Bibb County Schools
Centreville, Alabama

Schools — County Boards of Education — Salaries

Where members of the county board of education failed to claim and collect the two and one-half dollar increase in their compensation, as provided for by Act. No. 667, General Acts 1949, page 1031, effective September 19, 1949, amending Title 52, Section 68, Code of Alabama 1940, they can be paid such increase retroactive to September 19, 1949.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 31, 1951, is as follows:

"In view of Act No. 667, amending Section 68 of Title 52 of the Code of Alabama (1940), which relates to the compensation of the members of county boards of education, I would like to have an official opinion from your office on the following question pertaining to this amendment which was approved September 19, 1949.

"1. The members of the Bibb County Board of Education have been receiving, for official meetings, five dollars per meeting plus five cents per mile traveling expense. Can they be paid an additional two and one half dollars per official meeting retroactive to September 19, 1949?"

In my opinion, your question should be answered in the affirmative.

Prior to its amendment Title 52, Section 68, Code of Alabama 1940, fixed the compensation of members of the county board of education at five dollars a day. Act No. 667, General and Local Acts 1949, page 1031, which became effective on September 19, 1949, amends Section 68, *supra*, and reads as follows:

"The members of the county board of education shall receive from the public school funds of the county **seven dollars and fifty cents a day** and their actual traveling and hotel expenses incurred in attending meetings of the board, and transacting the business of the board. The members of the county board shall not be allowed pay for more than twenty-four days in any one year, and their expenses shall be paid in in like manner as provided for the compensation of teachers. They shall not be required to hold teachers' certificates." (Emphasis supplied.)

It will be noted that the compensation of the members of the county board of education shall be paid from "the public school funds of the county." Strictly speaking, however, such funds are State funds and are not county funds. **City Board of Education of Athens et al. v. Williams, Superintendent of Banks, et al.** 231 Ala. 137, 163 So. 802; **State et al. v. Williams, Superintendent of Banks, et al.** 236 Ala. 272., 181 So. 792; Quarterly Report of Attorney General, Vol. 54, page 57.

Therefore, the so-called "Statute of Non-Claim," as found in Title 12, Section 118, Code of Alabama 1940, which bars the payment of all claims against counties if not presented for allowance within twelve months after the time they accrue, does not here have a field of operation. I know of no other statute of limitation which bars the present payment of the increased compensation of the members of the county board of education in the amount of \$2.50 a day as provided for by Act No. 667, *supra*.

Very truly yours,

SI GARRETT

Attorney General

April 25, 1952

Honorable Raymond D. Fowler

Secretary-Treasurer

Employers' Retirement System

State of Alabama

364 South Ripley Street

Montgomery 5, Alabama

Employees Retirement System — Corporations

The Alabama Society for Crippled Children and Adults, Inc., is not a quasi public organization of the State as would entitle its employees to the benefits of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947, page 445.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, dated November 15, 1951, is as follows:

"The Alabama Society for Crippled Children and Adults has made application to participate in the Employees' Retirement System under the provisions of Section 12 of Act No. 515 of the 1945 Legislature. The Board of Control of the Employees' Retirement System has approved this application subject to your opinion as to whether or not this public society is qualified to participate as a public or quasi public organization.

"Will you please give me your opinion as to whether or not this organization does qualify for participation."

Section 12 of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947, page 445, is, in pertinent part, as follows:

"(1) The governing board of any county, city, town or **public or quasi public organization of the State** or of any political Subdivision thereof, . . . may, by resolution legally adopted to conform to rules prescribed by the Board of Control, elect to have its officers and employees from whatever sources and in whatever manner paid, become eligible to participate in the retirement system." (Emphasis supplied.)

The Alabama Society for Crippled Children and Adults, Inc., was incorporated on May 19, 1950, as a corporation, not for profit, but for charitable purposes. One purpose of the Society, as set out in the Articles of Incorporation, is, in pertinent part, as follows:

". . . and may exercise such powers as are incident to private corporations."

In the case of *Philadelphia Rural Transit Co. v. City of Philadelphia, et al*, 309 Pa. 84, 159 Atl. 861, a common carrier of passengers for hire sought relief from local taxation on the ground that it was a "quasi public corporation." The Court had this to say:

" A corporation cannot obtain judicial recognition as quasi public unless the service it renders to the public or a large part of it are so essential to public well being that any interference with its function by local administration agencies would be insufferable to the sovereign commonwealth.

In the case of *McLeod v. Central Normal School Association of Pennsylvania, et al*, 152 Pa. 575, 25 Atl. 1109, the Court had this to say:

" In order, however, that a private corporation may be regarded as quasi public, it must exist directly for the public use; the corporate franchise must be such as is held in the nature of a public trust, and such that the public has standing to assert and enforce its right."

" Corporations do not come within this class (quasi public corporations), however, where they are purely private undertakings, and are not given the power of eminent domain or other special privileges or franchises, although in a sense their undertaking or business may be of a public character." 14 C. J. Corporations, Section 46, page 76.

"A quasi public corporation may be said to be a private corporation which has given to it certain powers of a public nature, such for instance as the power of eminent domain, in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation" 7 R. C. L. Corporations, Section 15, page 41.

"Private corporations may be further classified, into business and eleemosynary. Eleemosynary corporations, or those created for charitable purposes, are such as are constituted for the perpetual distribution of free alms to such purposes as their founders and supporters have directed An eleemosynary corporation is a private as distinguished from a public corporation." 7 R. C. L. Corporations, Section 16, page 42.

Therefore, on the basis of the above quoted authorities, it is my opinion that the Alabama Society for Crippled Children and Adults, Inc., is not such an organization as would bring it within the scope of Section 12 of Act No. 515, as amended, supra, as contemplated by the Legislature. It is nowhere shown that the above Society has been granted special privileges, such as the right of eminent domain or other special franchises, which, had they been given to the Society, would have taken it out of the "private corporation class" and placed it in the "quasi public class." It appears that the above Society is an eleemosynary corporation, the purposes of which are purely charitable. It is a private rather than a public corporation because it lacks special privileges or franchises granted to it by the State.

It is, therefore, my opinion that the Alabama Society for Crippled Children and Adults, Inc., is not a quasi public organization of the State as would entitle its employees to the benefits of Act No. 515, as amended, supra.

Very truly yours,

SI GARRETT

Attorney General

April 25, 1952

Hon. J. James Teal

Clerk, Circuit Court

Barbour County

Clayton, Alabama

Desertion and Nonsupport — Cost and Fees — Fine and Forfeiture Fund — Sheriffs — Clerks of Circuit Courts.

1. No costs of any kind whatever may be taxed and collected in cases arising under Title 34, Chapter 4, Article 3 (Sections 89-104), Code of Alabama 1940.

2. In desertion and nonsupport cases, although the clerk and sheriff are not entitled to have costs taxed in such cases, the sheriff may be given a suitable allowance by the county governing body for his actual disbursements in serving process.

3. There being no authority to tax costs in desertion and nonsupport cases, such costs cannot be paid from the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

I have your request for an official opinion, bearing date of April 15, 1952, which is as follows:

"Thank you to please give me an opinion as to whether the Clerk and Sheriff are entitled to a claim against the fine and forfeiture fund for services performed in cases for violating Section 90 of Title 34 of the 1940 Code of Alabama, where the warrants are returnable to County Court and the case, when called is transferred to the Juvenile Court.

"We know that under the provisions of Section 102 of Title 34 of the Code, no costs can be taxed after the case is transferred, but we are interested in knowing if costs accruing up to the time of transfer are proper claims against the fine and forfeiture fund."

In my opinion, no costs of any kind can be taxed and collected in cases arising under Title 34, Section 90, Code of Alabama 1940, regardless of the cost of the court in which said cases are tried or transferred.

Cases arising under Section 90, supra, are known as desertion and non-support cases. Title 34, Section 102, Code of Alabama 1940, concludes as follows:

"There shall be no costs of any kind whatever taxed in cases arising under this article."

Therefore, even though the cases arising under Section 90, supra, were first called in the county court and the cases were thereafter transferred to the juvenile court, the cases in the county court and in the juvenile court were cases arising under Title 34, Chapter 4, Article 3, Code of Alabama 1940. It is the nature of the case that prevents the taxation of costs, and not the court involved.

As you know, Section 102, supra, authorizes the court of county commissioners to appropriate a suitable allowance to the sheriff for his actual disbursements in serving processes in cases of this nature.

It is needless to add that since no costs can be taxed by any court in desertion and nonsupport cases, no costs can be paid in such cases from the fine and forfeiture funds of the county.

Yours very truly,

SI GARRETT

Attorney General

April 25, 1952

Hon. George D. Motley, Jr.

Judge, County Court

Etowah County

Gadsden, Alabama

Adoption — County Courts — Department of Public Welfare —
Juvenile Court — Etowah County.

1. The provisions of Act No. 578, Local Acts 1947, page 390, do not give the County Court of Etowah County authority to grant consent as required by Title 27, Section 3, Code of Alabama 1940, to the adoption of minors in the custody of said court.

2. The exclusive methods of consent to the adoption of minors appear in Title 27, Section 3, Code of Alabama 1940, and include only consent by the parents, or, in certain cases, by the child's guardian, by the State Department of Public Welfare.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of November 7, 1951, is as follows:

"At the present time I am judge of the County Court of Etowah County, Alabama.

"This Court was created by Act of the Legislature, Regular Session 1947 under House Bill No. 1007. By virtue of said Act, this court was vested with all of the power, authority and jurisdiction in juvenile cases previously executed by the Probate judge of Etowah County, Alabama.

"The question has been raised by the State Department of Public Welfare as to whether or not this court has the right, under Code of Alabama 1940, Title 27, Section 3, to sign consent of adoption where the infant has been made a ward of the State by this Court upon proper application.

"It is a matter of vital interest that this question be clarified as the problem arises quite frequently where an infant is made a ward of the State and petition for adoption of this infant is filed in the Probate Court."

You are informed that the County Court of Etowah County does not have authority to consent, as required by Title 27, Section 3, Code of Alabama 1940, to the adoption of minors who have been made wards of the State.

The County Court of Etowah County was created by Act. No. 578, Local Acts 1947, page 390. By the terms of Section 1 of this act, this court "shall have and exercise original and exclusive jurisdiction in all juvenile and non-support cases arising in said county under Titles 13 and 14 of the Code of Alabama 1940, and amendments thereto, and shall have all of the powers therein conferred on the probate judge of said county in such cases."

Under Title 13, Chapter 7, Code of Alabama 1940, dependent, neglected, or delinquent children under 16 years of age are subject to the guardianship of the State and entitled to its care and protection. Section 361 of Title 13 provides for the commitment of such children by the juvenile court, or probate court sitting as a juvenile court, or, as in this case, the county court having the jurisdiction of the probate court in juvenile cases, and outlines the proper procedure in these instances.

Pursuant to Section 361, supra, a child may be committed to the home of its parents or guardian, or to a foster home, or to an appropriate state institution or other agency or institution approved by the State Department of Public Welfare, or the court may make such other order or judgment as it deems to be for the best interests of the child. After the court has assumed jurisdiction of a child, and pending disposition of such child by commitment or otherwise, the governing body of the county must, unless support is otherwise provided, provide for the support of the child while such child is in the custody of the court.

Title 27, Section 3, Code of Alabama 1940, provides as follows:

"§3. Consent when necessary, except as herein provided. — No adoption of a minor child shall be permitted without the consent of his parents, but the consent of a parent who has abandoned the child, or who cannot be found, or who is insane or otherwise incapacitated from giving such consent, or who has lost guardianship of the child, through divorce proceedings, or by the order of a juvenile court or court of like jurisdiction, may be dispensed with, and consent may be given by the guardian if there be one, or if there be no guardian by the state department of public welfare. In every such case the court shall cause such further notice to be given to the known kindred of the child as shall appear to be just and practicable. In case of illegitimacy the consent of the mother alone shall suffice except where paternity has been established. In all cases where the child is over fifteen years old his own consent must be had also."

This section clearly requires that consent to adoption must be given by the parents except in certain specified situations. In such cases, or if there be no parent living, consent may be given by the legal guardian; and if there be no legal guardian the State Department of Public Welfare has authority to grant this consent.

The county court has no authority to grant such consent required by Section 3, *supra*. The court cannot be said to be the guardian of the child within the meaning of this statute. "The term 'guardian,' without words of limitation, describes one who is charged with the duties of guardian of the person and property of the minor." *Burger v. Frakes*, 67 Iowa 460, 23 N. W. 746. Such guardian, by the terms of Title 21, Section 1, Code of Alabama 1940, is to be appointed by the probate court of the county in which the child resides.

In cases where there is no qualified parents and no guardian, Section 3, *supra*, permits the consent to adoption to be given by the State Department of Public Welfare. This is so even though the child may still be in the custody of the county court. Absent contrary legislative expression, the statutory procedure for consent set out in Section 3, *supra*, is the exclusive method. *Sutherland, Statutory Construction, Second Edition, Vol. 2, Section 611; Crawford, Statutory Construction, Section 264.*

Thus the County Court of Etowah County has no authority to grant consent to the adoption of infants who have come under its jurisdiction and custody.

Yours very truly,

SI GARRETT

Attorney General

April 28, 1952

Hon. Wm. W. Hill

Judge of Probate

Montgomery County

Montgomery, Alabama

Licenses — Taxation.

1. No license fee is due under Title 51, Section 551, Code of Alabama 1940, for the privilege of engaging in the business of upholstering and recovering furniture.

2. A license fee is due under Title 51, Section 511, Code of Alabama 1940, for the privilege of maintaining a shop solely for the repair of electric or gas refrigerators.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of July 23, 1951, is as follows:

"There seem to be two Sections of Title 51, Privilege Licenses, that are rather conflicting. Does an individual or firm who upholsters furniture, who does not build the furniture, but simply upholsters or recovers same, owe a license under Title 51, Schedule 551, Mattresses, cushions, Pillows, etc. He does not seem to perform either one of these.

"Title 51, Section 511, provides for the sale of Electrical and Gas Mechanical refrigerators, or for each electrical or Gas repair shop. The question is what constitutes an electrical or Gas repair Shop. Does one who maintains a shop solely for the repair of electrical or Gas Refrigerators, does not sell or deal in any other electric appliances, and does not maintain a shop for wiring or other electrical repair work, owe a State and County license under this Section 511. Please render your opinion on the two above schedules."

Title 51, Section 551, Code of Alabama 1940, requires that a person engaging in the business of manufacturing cushions, mattresses, pillows, or rugs "or the renovating, cleaning or reworking of same," shall pay the privilege or license tax set out in said section for the privilege of engaging in such business.

It appears that the person about whom you inquire upholsters or recovers furniture. It is my opinion that such work would not be included in the phrase, "renovating, cleaning or reworking" of cushions, mattresses, pillows or rugs.

Although cushions, mattresses, and pillows are, in a sense, a part of many pieces of furniture, nevertheless, one who is engaged in upholstering or recovering furniture is not engaged primarily in renovating, cleaning, or reworking the aforementioned items.

It is an elementary rule of construction that the tax laws are to be interpreted liberally in favor of taxpayers, and words defining things to be taxed should not be extended beyond their clear import. *Gottlieb v. City of Birmingham*, 243 Ala. 579, 11 So. 2d. 363.

The upholstering and recovering of furniture would seem to be a part of the process of repairing furniture. One who is engaged in the business of repairing furniture is not subject to the licensing of Section 551, *supra*. Cf. *Quarterly Report of Attorney General*, Vol. 21, page 175.

The answer to your second inquiry is in the affirmative.

The license fee required by Title 51, Section 511, Code of Alabama 1940, is imposed upon those who deal in electric, gas or other mechanical refrigerators, etc., "or for each electrical or gas repair, or electrical or gas supply shop." Thus, the license fee must be paid by one who engages merely in the business of maintaining a repair shop for electric or gas refrigerators. It is not necessary that refrigerators or other items be sold in such shop. Cf. *Quarterly Report of Attorney General*, Vol. 14, page 98.

Yours very truly,

SI GARRETT

Attorney General

April 28, 1952

Hon. J. D. Bullington

County Engineer

Chilton County

Clanton, Alabama

Counties — Roads and Bridges — Funds — Chilton County.

1. Road machinery purchased from the fund established by Act No. 31, General and Local Acts 1936, Extra Session, page 24, known as the "paving fund" may be used only for purposes of constructing and maintaining permanent types of paved roads.

2. Act No. 872, General and Local Acts 1951, page 1505, does not repeal Act No. 31, General and Local Acts 1936, Extra Session, page 24.

3. Road machinery owned by Chilton County and purchased from the "paving fund" may be transferred to the general road maintenance property if the machinery is given a fair value, and the "paving fund" is reimbursed the amount of this fair value.

4. In the discretion of the governing body of Chilton County, equipment purchased by the county out of gasoline tax funds (other

than the special fund set up by Act No. 31, General and Local Acts 1936, Extra Session, page 24) may be used in the construction and maintenance of any road in the county. It is not necessary for rental to be paid from the "paving fund" established by Act No. 31, supra, to the "gasoline tax or general maintenance fund" for the use of such equipment on hard surfaced roads.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1951, is as follows:

"As County Engineer of Chilton County, I hereby request your official opinion on the following:

"Under Local Act of Chilton County, Number 31, 1936 Special Session, there is set aside a fund commonly referred to as the paving fund. The Governing Body of Chilton County, and the Auditors have taken the position that the monies may be extended in this fund for the purchase or purchasing of equipment to be used **ONLY** for the purpose of building and maintaining hard surface roads.

"Under Section 17 of the Local Act of 1951 Creating the Board of Revenue and Control of Chilton County, said Act being Number 872, Section 17 provides that the roads should be kept on a County wide basis.

"Chilton County now owns certain road building and maintenance equipment purchased out of the paving fund, which heretofore has been used exclusively for the purpose of constructing and maintaining hard surfaced roads in this County. In view of the fact that the above Act requires that all roads be maintained on a County wide basis, please advise me:

"1. Is it permissible for me to use, in the maintenance and construction of the general road system in Chilton County, this equipment now in my possession as County Engineer?

"If not,

"2. Then, in your opinion, would it be permissible to value this equipment at its present value and reimburse the paving fund to that extent, and transfer this property from the paving fund property to the general road maintenance property?

"3. Does the Local Act Number 872, 1951 Regular Session Creating the Board of Revenue and Control of Chilton County, repeal the Local Act Number 31, 1936 Special Session creating the special paving fund?

"4. Can equipment owned by the general maintenance purchased out of the Gasoline Tax Fund be used on a rental basis to the paving fund in the construction and maintenance of Farm to Market or hard surfaced roads, on a State County Aid rental basis, said rentals to be paid from paving fund to Gasoline tax or maintenance fund?

"Your prompt reply to this request will be highly appreciated, as we have equipment purchased from the paving fund, now idle, and is badly needed for maintenance on the County Road System."

Questions 1 and 3 of your inquiry must be answered in the negative.

Act No. 31, General Acts 1936, Extra Session, page 24, provides in part as follows:

"Section 1. That from and after such time when Chilton County, Alabama has fully paid such sums as it may be liable for, on account of the paving of the Clanton-Selma Highway in Chilton County, Alabama, shall be required to set-aside and appropriate from the gasoline tax received by said Chilton County from the State of Alabama, an amount equal to its share of said tax of 1c per gallon, for the purpose of constructing and maintaining, in said County public highways of a permanent type of paved road.

"Section 2. That the expenditure by the Court of County Commissioners of Chilton County, Alabama of the gasoline tax of said County to the extent of the amount equal to its share of said Tax of 1c per gallon, for any other purpose than provided for in this Act is hereby declared to be unlawful and is hereby prohibited."

The provisions of this Act definitely limit expenditures from the fund thereby established to the construction and maintenance of permanent type paved roads.

Act No. 872, General and Local Acts 1951, page 1505, abolishes the Court of County Commissioners of Chilton County, and provides for the establishment of a Board of Revenue and Control for Chilton County. Among other provisions, the act sets out that the public roads, bridges, and ferries of said county will be constructed and maintained on a county-wide basis. The funds for this purpose are provided for in Section 24 of said act, which is in pertinent part as follows:

"Section 24. The authority of said County Engineer shall be limited to the expenditure of such funds for the purpose of construction, maintenance or repairs of public roads, bridges, and ferries of Chilton County as may be set aside and appropriated by the Board, as hereinafter provided; it shall be the duty of said Board at some meeting in September of each calendar year, or not later than the first meeting in October following, by order or resolution spread upon the minutes, to fix and determine the amount of funds which will be available for the purpose of building, maintaining and constructing public roads, bridges and ferries of Chilton County for the current fiscal year, beginning on October 1st, which said amount, other than the salary of said County Engineer and his necessary expenses, shall not be exceeded by him in building, maintaining and constructing public roads, bridges and ferries in Chilton County during said period:..."

There is no express repeal of Act No. 31, supra, in Act No. 872, supra, so if there is any repeal of such act it must necessarily be by implication.

Repeal by implication is regarded with disfavor by the courts, *Fuqua v. City of Mobile*, 23 Ala. App. 74, 121 So. 693; and the doctrine of implied repeal can be invoked and applied only in case there exists such a repugnancy between the two statutes that they cannot consistently stand together, *Maxwell v. State*, 89 Ala. 150, 7 So. 824, or where the subsequent act revises the

whole subject matter of the former and is intended to be a substitute therefor, **State v. Kolb**, 201 Ala. 439, 78 So. 817. The repugnancy between the two acts must be so glaring and irreconcilable as to clearly manifest a legislative intent to repeal. **State ex rel Tubbs v. White**, 160 Ala. 168, 49 So. 78; **Tucker v. McClendon**, 210 Ala. 562, 98 So. 797; **Board of Revenue v. Johnson**, 200 Ala. 533, 76 so. 859; **State ex rel Tyson v. Houghton**, 142 Ala. 90, 38 So. 761; **Southern Express Co. v. Tuscaloosa**, 132 Ala. 326, 31 So. 460.

The provisions of Act No. 31, supra, establish a fund from gasoline tax received by the county, and set out the specific use of that fund.

Act No. 872, supra, does not repeal by implication Act No. 31, supra, establishing the fund in question, but only provides that the Board of Revenue and Control will determine the amount available in each fund for use in the building, maintaining, and constructing public roads, bridges, and ferries.

Where both acts have separate field of operation, repeal by implication is not to be presumed **State ex rel Tyson v. Houghton**, supra. Such is true in the instant case. One act provides a fund to be used only for the construction and maintenance of paved roads of a permanent type, while the other encompasses, among other things, the procedure for the new form of county governing body to make the various and necessary funds available to the county engineer for the purposes set out in the fact.

The legislature is presumed to envision the whole body of the law when it enacts new legislation; and where the repealing effect of a statute is doubtful, the statute is to be strictly construed to effectuate its consistent operation with previous legislation. **State v. Clifton**, 177 Md. 572, 10 A 2d 703.

It is therefore my opinion that Act No. 872, supra, does not repeal Act No. 31, supra. This being so, the equipment purchased from the fund established by Act No. 31 may not be used on the general road system of Chilton County, but may be used only for the construction and maintenance of permanent type paved roads in the county.

Question No. 2 of your inquiry should be answered in the affirmative.

Neither Act No. 31, supra, nor Act No. 872, supra, nor any other statute, prohibits the transfer of the road machinery purchased from the fund established by Act No. 31 to the general road maintenance property; provided that a fair value of the property to be transferred be established, and that the fund from which the property is transferred be reimbursed in an amount equal to the fair value of such property.

Under the provisions of Title 23, Section 43, Code of Alabama 1940, the county governing body is given broad discretionary powers in relation to the construction, maintenance, and repair of roads and bridges of the county. It may purchase and maintain road machinery and motor vehicles to this end. **Ensley Motor Co. v. O'Rear**, 196 Ala. 481, 71 So. 704. While this power of a county governing body may be limited by local and special statutes, in the instant case the local statutes do not limit this power in any respect here pertinent.

In reference to your fourth inquiry, it is my conclusion that, in the discretion of the governing body of Chilton County, equipment purchased by the county out of gasoline tax funds (other than the special fund set up by Act No. 31, supra) may be used in the construction and maintenance of any road in the county. It is not necessary for rental to be paid from the "pav-

ing fund" established by Act No. 31, supra, to the "gasoline tax or general maintenance fund" for the use of such equipment on hard surfaced roads. The only restriction on the county governing body in the use of gasoline tax funds for the maintenance and construction of grades is in the use of the fund established by Act No. 31, supra.

Yours very truly,

SI GARRETT

Attorney General

May 1, 1952

Hon. A. C. Shelton, Superintendent

Board of Education

Calhoun County

Anniston, Alabama

Schools — Taxation — Warrants — Bonds — Calhoun County.

Under Constitutional Amendment LXVIII, the revenue from the special five-mill school tax, authorized by said amendment and required to be used in a particular district, cannot be used to repay or retire warrants issued for the county schools as a whole, under the provisions of Title 52, Section 216, Code of Alabama 1940, because the revenues from the special five-mill school tax under the constitutional amendment are pledged, and must be used for schools within a certain district in the county.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 2, 1951, is as follows:

"A Constitutional Amendment was ratified by the voters of the State on January 15, 1948, permitting the school districts of Calhoun County and the independent school systems of Calhoun County to hold a five-mill tax election for school building purposes. The tax election was held on March 16, 1948, and passed by the voters.

"Calhoun County has two districts and an opinion was rendered by your office on February 15, 1949, stating that money collected in one district must be spent in that district and could not be spent in the other.

"\$200,000 was realized from the sale of bonds for District One and \$500,000 for District Two. The amount of \$500,000 for District Two after being supplemented by a small amount of Building Commission Funds was not sufficient to provide for all needs in District Two. Also a build-

ing burned in District Two which made it necessary for the Board of Education to issue local tax warrants in the amount of \$133,000 exhausting the credit of the entire County. The entire amount of \$133,000 was spent in District Two. The buildings which were erected partly from the warrant sale are now being completed.

"The Board of Education is now contemplating re-financing the five-mill tax bonds. Since the entire amount of \$133,000 was spent in District Two, will it be permissible to use \$133,000 of the District Two five-mill tax money to repay the warrant issue of \$133,000 so that in case of a fire or any other emergency in either district warrants could be reissued.

In addition to your original request, I also have your letter of July 16, 1951 supplying additional information, which is as follows:

"The local tax warrants were issued under Title 52, Section 215. The warrants were issued for the whole County, but the money was spent in District Two.

"Our three mill tax will expire with the year 1957. Since the tax will expire within such a short period of time the State Superintendent of Education would not approve the issuance of warrants for more than the amount of \$133,000. Since that is the case we would be unable to issue additional warrants in case a building burned or we needed money for any other purpose."

Since Title 52, Section 215, Code of Alabama 1940, treats with the minimum program fund, I presume that you meant to refer to Title 52, Section 216, Code of Alabama 1940, which treats with the issuance of warrants.

In my opinion, it is not permissible to use \$133,000 of the District Two five-mill tax money to repay the warrant issue of \$133,000.

It is clear that the constitutional amendment referred to in your inquiry, Amendment LXVIII, proclaimed ratified January 15, 1948, authorized the levy of a special five-mill tax within each school district in Calhoun County. It is also clear that the proceeds of the tax must be used within each respective school district. **Opinion of the Justices**, 251 Ala. 78, 36 So. 2d 499; Quarterly Report of Attorney General, Vol. 54, page 85. It is also clear from your inquiry that the local tax warrants referred to, in the amount of \$133,000, were based upon a tax levy in the county as a whole and not in reference to any particular school district.

The constitution amendment, *supra*, authorizing the five-mill tax, provides that the funds arising from said tax levied in each school district in Calhoun County may be pledged by the county for the payment of bonds and interest thereon. I presume that in respect to District Two, the funds arising from the five-mill tax were pledged to the payment of the principal and interest on the bonds issued for that district, as authorized by the constitutional amendment, *supra*. It is my opinion, therefore, that to use the funds arising from the special five-mill tax levied and collected in District Two

for the purpose of retiring principal and interest on local tax warrants issued for the county as a whole, would be a diversion of the special five-mill tax collected for the sole purpose of paying principal and interest on bonds issued by the county for District Two under the constitutional amendment. The effect of such a diversion would amount to the spending of the funds arising from the five-mill special tax for District Two in another district, which, in my opinion, is unauthorized.

Yours very truly,

SI GARRETT

Attorney General

May 20, 1952

Hon. D. W. Hodo, Treasurer

Alabama Building Corporation

Montgomery, Alabama

Alabama Building Corporation — Corporations — Health and Health Department.

1. The Alabama Building Corporation is empowered to construct a state office building designed for occupancy by the State Health Department, and to lease the said building to the State Health Department; provided that the space leased to the State Health Department shall consist of space remaining after said corporation has entered into a lease with the State Department of Industrial Relations for space to be occupied by the latter department; and provided that all other applicable provisions of Act No. 477, General and Local Acts 1951, page 844, are complied with.

2. The limitation of \$3,250,000 provided in said Act No. 477 is a limitation upon the cost to said corporation of any building or buildings constructed by it, and does not prevent the construction by said corporation of a building or buildings the aggregate cost of which exceeds \$3,250,000, so long as the portion of said cost supplied by said corporation does not exceed \$3,250,000.

Opinion by the Attorney General.

Dear Sir:

Your request or an official opinion, bearing date of May 9, 1952, is as follows:

"My office has been presented with a problem relative to the Alabama Building Corporation of which you are the Secretary.

"Act No. 477, 1951 Acts, page 844, as you know, provides for the new corporation and the erection and construction of an office building or

buildings. It has come to our attention that it will be more practical to build two buildings inasmuch as we can get federal aid through the Hill-Burton Act for the Health Department, and it is with that thought that a building be constructed for the Health Department in the 500 Block of Darter Avenue, back of the Judicial Building, for occupancy by the Health Department for offices and laboratories.

"As you know the Act was intended to build what buildings may be needed and it specifies throughout the Act 'office building or buildings'. However, Section 11 and in Sections 13 and 14 the term is used in the singular. We both know the legislative intent in this matter.

"Mr. William A. Rose, the attorney who will furnish the legal opinion for the sale of the securities is of the same opinion, that is, that more than one building may be built provided the funds are limited to \$3,250,000 as provided in the Act. Because of the technicalities customarily dealt with in the sale of securities, it is requested that you supply us with your official opinion on this question.

"It will be well to clarify one other position at this time, and that is that the limitation of \$3,250,000 as provided in the Act applies to the maximum amount of securities to be issued by the corporation and does not prevent a contribution from the federal government as is hoped to be obtained by the application of the Hill-Burton Act for the State Health Department Building.

"As you know, we are working hard toward the breaking of ground for this long sought greatly needed project and your prompt handling of

this matter will help to expedite the issues as they are presented."

In my opinion, it is clear that more than one state office building may be constructed by the Alabama Building Corporation, the corporation formed pursuant to authorization in Act No. 477, General and Local Acts 1951, page 844. In Section 1 of said act, setting forth the legislative intent, it is recited that the sole purpose of the corporation shall be "constructing, erecting, operating and maintaining... a State office **building or buildings**." (Emphasis supplied.) In subdivision (5) of Section 6 of said act, the corporation is authorized to erect, operate, and perform other acts with respect to "the **buildings** of the corporation"; and in subdivision 8 of said Section 6 is authorized to lease... the office **building or buildings** constructed and operated by it." (Emphasis supplied.) Section 10 of said act provides that proceeds from the sale of any securities of the corporation shall be used solely for "constructing, erecting, and equipping an office **building or buildings**" and contains other references to a **building or buildings**." (Emphasis supplied.) Section 14 of said act authorizes the placing of a statutory lien upon "the **buildings** and properties" of the corporation. (Emphasis supplied) Section 18 of said act provides, after payment of all securities issued by the corporation, for conveyance to the State of "all the **buildings** and other properties" of the corporation. (Emphasis supplied.) It is true that, in Sections 11 and 16 of said act, there are references to "the building" and to "said building," such references being in the singular and not in the plural. I am, however, of the opinion that those references should be construed as applying to any building or buildings constructed by said corporation, and that the act as a whole can be interpreted only as being intended to authorize the construction of one or more office buildings.

Subsection (8) of Section 6 of Act No. 477, supra, authorizes the corporation to make lease agreements with "any department, commission, board, or agency of the State for the use and occupation of all or any part of the office building or buildings constructed and operated by" the cor-

poration. It will be noted further that Section 16 of the said act specifically authorizes the corporation and several designated state officials, including the State Health Officer for the State Health Department, "to enter into lease agreements for use and occupancy of all or any part of the remaining office and storage space in said building." The phrase "remaining space" clearly refers to the space remaining after execution of a lease between the corporation and the Director of the State Department of Industrial Relations.

It is, therefore, my opinion that the program mentioned in your letter for construction by Alabama Building Corporation of two office buildings, one of which is to be designed for occupancy by the State Health Department, is within the powers of Alabama Building Corporation. It is, of course, essential that the corporation comply with all the provisions of the act, including the provision that the total cost to the corporation of any buildings constructed by it shall not exceed \$3,250,000, and the provision that the space available to departments and agencies other than the Department of Industrial Relations shall consist of "remaining" space not required by that department.

You also ask whether the limitation of \$3,250,000 set forth in Act No. 477, *supra*, applies to the total cost of all buildings constructed by the corporation, or whether it applies merely to the amount of securities which the corporation is authorized to issue, it being contemplated that an application will be made for federal funds to be furnished under the Hill-Burton Act for part of the cost of constructing the proposed building to be occupied by the State Health Department.

It is my opinion that the said limitation applies to the cost to the corporation of any buildings constructed by it, and that any funds contributed by the Federal Government, or from any other source, should not be counted as a part of the cost of such buildings to the corporation. Subdivision (6) of Section 6 of Act No. 477, *supra*, places a limitation in the same amount (\$3,250,000) on the amount of money which the corporation may borrow. It is clear that the two limitations should be construed together, and that the purpose of the limitation as to cost is not to prevent contributions or gifts to the corporation, but is to restrict the amount of obligations that can be incurred by the corporation.

It is noted that the plan set up in Act No. 477, *supra*, for construction by Alabama Building Corporation of one or more office buildings, and for the leasing of any such buildings to departments and agencies of the State upon the terms set forth in the act, is substantially the same as the plan approved by the Justices of the Alabama Supreme Court in *In re Opinion Of The Justices*, 252 Ala. 465, 41 So. 2d 761.

Yours very truly,

SI GARRETT

Attorney General

May 28, 1952

Honorable H. A. Longshore

Superintendent of Insurance

C A P I T O L

Insurance — Contracts — United States.

1. The State of Alabama has no authority to regulate the terms of a contract executed by an insurance company with the Federal government outside the State of Alabama covering properties situated in the State of Alabama.

2. The transactions arising under the contract in question, which on its face, appears to be a contract between the Houston Fire and Casualty Insurance Company and the Federal government, are actually and in legal effect contracts of insurance between the Houston Fire and Casualty Insurance Company and residents of the State of Alabama, and, as such, are subject to regulation by the Bureau of Rates of the Department of Insurance of Alabama.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of November 28, 1951, is as follows:

"On November 2, 1949, the Certificate of Authority of the Houston Fire and Casualty Insurance Company, of Ft. Worth, Texas, to do business in this State was suspended by the Director of Commerce of the State of Alabama. The reason for this suspension was failure of the Company, after due notice, to comply with the regulatory provisions of Act 132, General Acts, 1945, Page 133, which act regulates rates of fire insurance companies of this State.

The Department of Insurance has recently been informed that the Houston Fire and Casualty Insurance Company is continuing to do business in Alabama even though its Certificate of Authority has not been in effect for more than two years. Under these circumstances, it is important that the question of the Company's responsibility to comply with the insurance regulatory laws of Alabama be definitely settled.

"It is the contention of the Company that since the only policies of insurance which the company writes on risks in Alabama are written pursuant to a contract between the Company and the Federal Government, the Company is not subject to regulation by the Department of Insurance. According to a copy of the Contract to Insure between the United States Department of Agriculture and the Houston Fire and Casualty Insurance Company, the latter agrees to insure against the hazards of fire, lightning, windstorm, etc., certain properties in which the Department of Agriculture has an interest '—by virtue of the fact that the title thereto is vested in the government, or that it is the mortgagee under mortgages, or the beneficiary under deeds of trust made by persons, associations, or corporations to which the government has conveyed title, or that it is the mortgagee under mortgages or the beneficiary under deeds of trust made by persons, associations, or corporations to which the government has made loans—'

"The agreement further provides, 'It is distinctly understood and agreed that the government assumes no liability for the payment of premiums for any insurance issued thereunder, except for such insurance as may be issued directly to and in the name of the government as the insured. The premiums on all other insurance will be charged to the insured in each instance. At the end of each month, a statement of premiums for insurance written during such month shall be submitted to the government and such premiums shall be due and payable by the respective insured ninety (90) days thereafter.'

"The Master Form (or insurance policy) states that all insurance issued thereunder is subject to the Contract to Insure referred to above. It further provides, 'The insured hereunder shall be the United States of America or such corporations, associations, or individuals as may be designated as such, or both, and shall be named in each policy or certificate of insurance issued hereunder.'

"We are informed that employees of the Department of Agriculture ordinarily obtain necessary underwriting data from the individual borrower and that such employees collect the required premium from the borrower. The certificate of insurance is subsequently issued and delivered to the borrower, subject to the conditions of the Master Form which, in turn, is subject to the Contract to Insure between the Government and the Houston Fire and Casualty Insurance Company.

"Under the circumstances set forth above, the following questions arise;

"1. Does the State of Alabama, through its Insurance Department, have authority to regulate a contract of insurance executed by an insurance company with Federal Government, outside the State of Alabama, covering properties in Alabama?

"2. Does the State of Alabama, through its Insurance Department, have authority to regulate a contract made under the circumstances heretofore set out in this request and under the attached contract between the Houston Fire and Casualty Insurance Company and the Federal Government?

"I attach hereto a copy of the contract between the Houston Fire and Casualty Insurance Company and the Federal Government for your information and use."

It is my opinion that your first inquiry should be answered in the negative.

The Supreme Court of the United States in the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, held that:

"The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

This ruling has been upheld continuously by the Supreme Court and is supported by decisions in the recent cases of *McDermont v. State of Wisconsin*, 228 U. S. 115, 57 L. Ed. 754; *Pacific Coast Dairy v. Department of Agri-*

culture et al, 318 U. S. 285, 87 L. Ed. 761; **Mayo et al v. United States**, 319 U. S. 441, 87 L. Ed. 1504; and many others.

It, therefore, follows that the United States is immune from state regulations of the price terms of its contracts.

You are, therefore, advised that the State of Alabama, through its Bureau of Rates of the Department of Insurance, does not have authority to regulate the terms of a contract executed by an insurance company with the Federal government, outside of the State of Alabama, nor does it have authority to regulate the terms of insurance policies executed outside the State of Alabama, between the Federal government and an insurance company, covering properties in the State of Alabama.

In considering your second inquiry, I have carefully studied the contract attached to your request. It is my opinion that the transactions arising under this contract, which, on its face, appears to be a contract between the Houston Fire and Casualty Insurance Company and the Federal government, are actually and in legal effect contracts of insurance between the Houston Fire and Casualty Insurance Company and residents of the State of Alabama, and, as such, are subject to regulation by the Bureau of Rates of the Department of Insurance of Alabama.

The determining factors as to whether the transactions are contracts between the Houston Fire and Casualty Insurance Company and residents of the State of Alabama, and, as such, subject to state regulations, are as follows:

1. No insurance covering residents of or property situated within the boundaries of this State was provided by the 1939 contract, or master policy, as it is referred to; but, on the contrary application is made by the insured, a resident of Alabama, to the Houston Fire and Casualty Insurance Company through employees of the Farm Security Administration before any insurance takes effect.

2. Such application is executed in the State of Alabama by a resident of this State, covering property situated within this State, and, together with the first annual premium, is handed to an employee of the Farm Security Administration, who forwards such application and annual premium to the Houston Fire and Casualty Insurance Company. In so doing, such employee is acting as an agent of the Houston Fire and Casualty Insurance Company.

3. Premiums are paid in the State of Alabama by the insured, Alabama residents, to employees of the Farm Security Administration, who, in that respect, are acting as agents for the Houston Fire and Casualty Insurance Company.

4. Losses are adjusted with the insured, Alabama residents, and the Federal government in Alabama.

5. Since the Federal government assumes no liability for payment of premiums under the contract, regulation thereof by the State of Alabama would not place a burden upon the Federal government.

Several recent decisions by the Supreme Court of the United States support the conclusions reached herein. The leading case is **Palmetto Fire Insurance Company v. Harry L. Conn, Superintendent of Insurance of the**

State of Ohio, 272 U. S. 295, 71 L. Ed 243. In that case the insurance company entered into a contract of insurance in Michigan with the Chrysler Sales Corporation, a Michigan corporation, which sells all the automobiles made by the Chrysler Corporation. This contract purported to insure purchasers of Chrysler cars against fire and theft, and to become automatically effective from the date on which the purchaser took delivery or a bill of sale of the car, the Chrysler Company to send a monthly report to the insurance company of all cars for which insurance was to be provided and to pay premiums accordingly, at Detroit, Michigan. If a person bought a car he got the insurance whether he wanted it or not. A certificate of insurance was sent him by the insurance company.

The Supreme Court ruled that the State of Ohio had authority to tax such transactions. Note the language of Mr. Justice Holmes, who delivered the opinion of the Court:

"Manifestly there was nothing in the contract between the plaintiff and the Chrysler Sales Corporation, without more, that Ohio could lay hold of, even if it insured property in Ohio. But the contract contemplated and provided for a benefit to third persons if, when, and where they complied with its conditions. When a man bought a car in Ohio, by that act he made effective the agreement of the company to insure future purchasers, and imposed upon it an obligation that did not exist before. It is true that the obligation arose from a contract made under the law of another state, but the act was done in Ohio and the capacity to do it came from the law of Ohio, so that it co-operation of that law was necessary to the obligation imposed. It would be held in some jurisdiction that the purchaser became party to a contract with the insurance company. By universal consent he at least would become the beneficiary of a contract for his benefit. Whatever technical form may be given to the reasoning, the substance is that by acts done in Ohio the purchaser obtains for himself the advantage or insurance that before that moment did not exist. It does not matter whether his getting it was a large or an inconspicuous feature of his bargain. It was part of it in any event, and we cannot doubt that the lower court was right in holding that in such circumstances the state could insist upon its right to tax"

In the later case of **Hoopston Canning Company v. Cullen, 318 U. S. 313, 87 L. Ed. 777**, the Supreme Court upheld the doctrine of the **Palmetto** case, *supra*.

Mr. Justice Black, in delivering the opinion of the court, said:

"The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York. The states have long held great authority over property within their borders. A state may make flood control, quarantine, conservation and zoning regulations affecting property within its bounds. It is the source of law for the forms of conveyances, for the nature of covenants, future interests and easements, for the construction of wills, trusts, and mortgages, and for many other legal principles affecting property interests. Contracts formally made in other states may remain subject to the law of the state of the situs of the property, particularly in respect to immovables. There is no more reason to bar the state from authority over the insur-

ance of the property within it than to exclude it from control of all the other property interest mentioned.

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"We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn v. Ozlin*, supra, of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. . . . "

You are, therefore, advised that, although the State of Alabama does not have the authority to regulate contracts of insurance between a foreign corporation and the Federal government, executed outside of the State of Alabama, the transactions occurring in this instance are actually contracts of insurance between the Houston Fire and Casualty Insurance Company and private persons, residents of Alabama, and, as such, are subject to regulation by the Bureau of Rates of the Department of Insurance of Alabama.

Very truly yours,

SI GARRETT
Attorney General

May 29, 1952

Hon. H. E. Lindsey, Chairman
Marion County Board of Revenue
Hamilton, Alabama

Counties — Funds — Sales Tax — Marion County.

Marion County has legal authority to spend county funds for the purpose of hiring a lifeguard for a public swimming and fishing lake located within the county, owned and operated by the State Department of Conservation, and may pay such funds either from its General Fund or from the revenue arising from the taxes levied by Act No. 81, General and Local Acts 1951, page 296.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1951, is as follows:

"The Board of Revenue has asked that I get your opinion on the following matter:

"The Board of Revenue is desirous of hiring a lifeguard to be on duty at the Marion County Public Lake located between Hamilton and Guin in said county. The land for this lake was purchased by the county and donated to the State Department of Conservation for the construction of a lake for swimming and fishing purposes.

During the summer months great crowds of children use the lake for swimming, inasmuch as a beach and swimming dock has been provided. From the standpoint of safety for the citizens using the swimming facilities the Board of Revenue feels like it is morally obligated to have a lifeguard on duty during these few months.

"Our question is—Can we hire a lifeguard on a temporary basis, that is for four months during the year and pay him out of county funds?

"If your answer to that question is yes, may we pay him out of general funds? Is it also possible for us to pay him out of the Marion County sales tax funds under Act No. 81 of the 1951 acts of the legislature? A part of section 7 of said act provides that this money may be spent also 'for other public health purposes of any kind and description.' Frankly, the Board would like to pay the salary out of this sales tax fund if at all possible."

In my opinion, each of your three questions should be answered in the affirmative.

This office has held that county funds may be used for the construction and maintenance of state parks within the county. Biennial Report of Attorney General, 1934-1936, page 181.

Subdivision 22 of Section 12, Title 12, Code of Alabama 1940, as amended in respects not here material, authorizes the use of county funds for the purpose of developing, advertising, and promoting water resources of the county. In my judgment, this clearly includes the authority to hire a lifeguard for the purpose described in your request, and to pay him out of the county general funds.

In my further opinion, the cost of maintaining such a lifeguard may be paid from the revenue arising from the taxes levied under the provisions of Act No. 81, General and Local Acts 1951, page 296. Section 7 thereof, after providing that the said revenue must first be spent for certain specified purposes, provides that it may be spent "for other public health purposes of any kind and description as in the judgment of said Morgan County Board of Revenue is meet and proper." In final analysis, public parks, swimming pools, and lakes which afford to the citizenships of the county a safe means of healthful recreation and enjoyment serve public health purposes just as effectively as institutions for the care of the sick and wounded. Lifeguards are, in a limited sense, guardians of the public health.

Very truly yours,

SI GARRETT

Attorney General

May 30, 1952

Mrs. T. L. Bear, Jr.,
Chairman, Milk Control Board,
1510 South Hull Street
Montgomery, Alabama

Milk Control Board — Interstate Commerce— United States.

1. Proposed method for determining base price rate for milk delivered to distributor from producers in Alabama is authorized by Title 22, Section 223, Code of Alabama 1940, and such method is not violative of the commerce clause of the Constitution of the United States (Article 1, Section 8, Clause 3).

2. The Milk Control Board cannot control distributor-licensees in such manner as to prohibit such licensees from purchasing milk in another state at a price below the minimum fixed by the Board for the purchase of Alabama produced milk, as such action would violate the commerce clause of the United States.

3. The Milk Control Board cannot prohibit its licensees from selling milk at a price below the minimum fixed by the Board on government reservations used for military purposes, where such reservations were acquired by the government prior to May 31, 1941, and the same is true concerning property acquired subsequent to that date unless the act or instrument of cession of jurisdiction to the government provides otherwise.

Opinion by Assistant Attorney General Miller.

Dear Mrs. Bear:

Your request for an official opinion bearing date of September 3, 1951, is as follows:

"The Milk Control Board of the State of Alabama desirous of securing the opinion of your office regarding its authority under Title 22, Sections 205-231, inclusive, with reference to the following matters:

"1. Does the Milk Control Board have the authority to reserve base quotas for the exclusive use of licensees of the Milk Control Board?

"2. Does the Milk Control Board have the authority to control its licensees in such a manner so as to prevent their purchasing out-of-state milk at a price lower than the price paid for base or surplus milk within the State?

"3. Does the Milk Control Board have the authority to prohibit its licensees from distributing milk, within the State to government reservations at a price less than those established by the Board where out-of-state milk has been co-mingled with milk produced within the State?"

Additional information received from the Executive Secretary of the

Milk Control Board in connection with your Question No. 1 indicates that the Milk Control Board has established a system for determining prices to be paid to producers of milk by distributors thereof, which system provides, in substance, that milk received by a distributor is paid for at two price rates known as the base price and surplus price, the latter being a lesser price; that the quantity of milk paid for at each rate is determined by the quantity of milk received by a distributor during a six months period, known as the base period, which begins October 1 and ends March 31; that milk and by-products thereof are divided into two classes according to usage which are known as Class 1 and 2; that at the end of a base building period the price to be paid to the producer at the base rate for the next 12 months period is determined by the proportionate part or percentage of milk which the producer delivered to a distributor, that is, if a producer delivered to a distributor 10 % of the total volume of milk received from all producers during the base period, such producer, during each two-week pay period, would be paid the base price for 10% of the distributor's sales of Class 1 milk, and all milk received from the producer above this amount is paid for at the surplus rate; that the percentage allotted to producers for the payment of the base price rate is known as base quotas.

I understand from your Question No. 1 that you wish to know whether base quotas may be reserved for the exclusive use of licensees of the Milk Control Board, all of whom are producers of milk in Alabama. In other words, at intervals during a base period it frequently becomes necessary for Alabama distributors to go to other states and purchase milk which they transport to Alabama where the milk is bottled and sold to dealers and consumers, and you desire my opinion as to whether the Milk Control Board may, for the purpose of computing base quotas, use only the quantity of milk which is produced in Alabama and delivered to Alabama distributors and likewise allot base price quotas only to Alabama producers.

The Alabama State Milk Control Board, created pursuant to the provisions of Title 22, Sections 205-231, Code of Alabama of 1940, as amended, regulates the fluid milk industry in Alabama and its declared purpose is to promote the production and orderly marketing of an adequate supply of wholesome and healthful milk. To answer your Question No. 1, it must be determined whether the State Milk Control Law authorizes the proposed method of fixing the price to be paid to producers by distributors for milk delivered to such distributors during a given period of time.

Section 223 of Title 22, *supra*, which authorizes the Milk Control Board to fix minimum prices to be paid by distributors of milk to producers thereof, in part, as follows:

" . . . When in the judgment of the milk control board, it is necessary or advisable, due to seasonal fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser price for milk which is produced in excess of what is needed for fluid milk consumption, the milk control board may establish the quantity of milk which the distributor or milk dealer shall pay for the fluid or base milk price, and may establish a lesser price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the milk control board may compute said quantity upon a uniform system of plant usage, classifying milk according to its various usage and establishing different prices which the milk dealer or distributor shall pay for such classification, or the milk control board may, if it deems it most advisable, establish a base surplus system, placing all milk sold by a plant for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser price for said surplus milk so used in

the by-products classification, or the milk control board may use a combination of both system" (Emphasis supplied.)

The above quoted portion of Section 223, supra, expressly authorizes the establishment of a base surplus system, placing all fluid milk sold by a distributor in one classification and establishing a price therefor, and milk processed into by-products into another classification and fixing a lesser price for surplus milk used in the by-products classification.

From the facts you have furnished concerning the system established by the Milk Control Board for determining the price to be paid by distributors to producers of milk, it is my judgment that the Board has established a system which is authorized by Section 223, supra. The price fixing authority of the Milk Control Board has been upheld by our Supreme Court. **Franklin vs. State**, 232 Ala. 637, 169 S. 295. **Taylor v. State**, 237 Ala. 178, 186 So. 463.

Since your question involves milk purchased in other states and transported to Alabama, it must be determined whether the exclusion of this milk from the total volume delivered to an Alabama distributor during a base period and likewise allotting base quotas only to Alabama producers violates the commerce clause of the Constitution of the United States. Article 1, Section 8, Clause 3, **Constitution of the United States**. The commerce clause delegates to the Congress of the United States the power to regulate commerce among the several states. A state may not, in any form, directly burden the prosecution of interstate business. **International Textbook Co. v. Pigg**, 217 U. S. 91, 54 L. ed. 678, 30 S. Ct. 481. It must, therefore, be determined whether the method the Board proposes to use in determining the percentages of base quotas to be allotted to Alabama producers of milk will result in placing a burden on interstate commerce. From the facts at hand, I am unable to perceive where the price fixing method proposed in your inquiry places any direct burden upon interstate commerce. There is nothing in this system which prohibits distributors of milk in Alabama from purchasing milk from producers in other states when the necessity arises, nor is there anything in such system prescribing the price to be paid for milk purchased outside of the State. Moreover, I am unable to see where the exclusion of the amount so purchased would place a burden upon interstate commerce. If this system should operate to deter distributors in Alabama from purchasing as large a quantity of milk from the out-of-state producers than would be purchased if the quantity so purchased were used in computing base quotas for the reason that the greater amount purchased by local distributors from out-of-state producers would result in reducing base quotas to be allocated to Alabama producers which would further cause a lesser price to be paid to such producers; then, and in that event, such a result, in my opinion, would be merely incidental or so indirect as to not offend the commerce clause of the Federal Constitution. The case of **Milk Control Board vs. Eisenberg Farm Products**, 306 U. S. 346, 83 L. ed 752, 59 S. Ct. 528, holds that state police statutes which involve a burden on interstate commerce incidentally or indirectly are not an unconstitutional interference with the grant to Congress of the power to regulate interstate commerce. A pertinent excerpt from this decision is as follows:

" . . . One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce" (Emphasis supplied.)

In view of the above, my answer to your question 1 is that if the Milk Control Board deems it necessary to effectuate the purpose of the State Milk Control Law, such Board may, in computing base quotas, exclude the quantity of milk received from other states by Alabama distributors and such base quotas may be allocated only to Alabama producers.

I understand from your Question 2 that you desire to know whether the State Milk Control Board can control its distributor-licensees in such a manner whereby they would be forbidden to purchase out-of-state milk at a price lower than the price paid to producers within the State.

My answer to your question is in the negative.

The Supreme Court of the United States ruled in the case of **Baldwin vs. G. A. F. Seeling**, 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55, that a minimum price level having been established to be paid to producers of milk in the State of New York, the milk control authorities of that state could not fix the price which should be paid to Vermont farmers and farmers of other states for milk which they should sell in their own state for transportation to New York. The New York milk control statute, with the aid of regulations made thereunder, set up a system of prices to be paid by distributors to producers, and prohibited the sale within the state of milk bought from outside the state unless the price paid to the producers would be lawful upon a like transaction within the State. The Court ruled that this action by the State of New York was violative of the commerce clause of the Constitution of the United States, *supra*. A pertinent excerpt from this decision is as follows:

"New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. **New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones**

"Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. . . . Imposts and duties upon interstate commerce are placed beyond the power of a state, with the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . (Emphasis supplied.)

Based upon the conclusion reached in the above cited case, it is my opinion, and you are accordingly advised, that the Milk Control Board does not have the authority to control its distributor-licensees in such a manner that would prevent their purchasing milk from producers in other states at a price lower than the established price set by the Milk Control Board for payment of milk produced within the State.

I understand from your Question No. 3 that you desire my opinion concerning the authority of the Milk Control Board to prohibit its licensees from distributing milk on Federal reservations located within the State of Alabama and used for military purposes, where such licensees sell or offer to sell milk on the reservation below the price set by the Milk Control Board.

In an opinion of this office addressed to the Milk Control Board, under date of August 14, 1939, Quarterly Report of Attorney General, Volume 16,

page 158, it was held that the Milk Control Board could not prohibit a licensee of the Board from selling or offering to sell milk at a price lower than the minimum price fixed by the Board, where the sale of such milk is made on a Federal reservation which had been acquired by the United States for military purposes. This opinion, however, is controlling with respect to property acquired by the United States for military purposes prior to May 31, 1941, the date on which the Code of Alabama of 1940 became effective, for the reason that such Code contains a statute (Title 59, Section 19, Code of Alabama 1940) which changes the law in this respect to some extent. In view of Section 19, supra, jurisdiction over all lands acquired by the United States subsequent to the effective date of the Code is made dependent upon the act or instrument of cession, and unless the act or instrument of cession expressly reserves jurisdiction on behalf of the State, the Milk Control Board does not have authority to control its licensees' sales on a government reservation used for military purposes. See Quarterly Report of Attorney General, Volume 23, page 227.

Answering your specific question, it is my opinion that the Milk Board does not have the authority to prohibit its licensees from selling milk, at a price below the minimum fixed by the Board, on government reservations used for military purposes, located within the State, which were acquired by the United States prior to May 31, 1941, and the same is true regarding such reservations acquired subsequent to that date unless the act or instrument of cession expressly reserves jurisdiction on behalf of the State. See the case of **Pacific Coast Dairy, Inc., vs. Department of Agriculture of California**, 318 U. S. 285, 87 L. ed. 761, 63 S. Ct. 628, and compare **Penn. Dairies, Inc. vs. Milk Control Commission of the Commonwealth of Pennsylvania**, 318 U. S. 261, 87 L. ed. 748, 63 S. Ct. 617.

In considering your Question No. 3, I have not overlooked your statement that "out-of-state milk has been co-mingled with milk produced within the State." Additional information received from your Executive Secretary indicates that this milk is co-mingled with Alabama produced milk at the time it is pasteurized and bottled at an Alabama distributor's establishment. Such co-mingling of milk produced in another state with milk produced in Alabama is not material to nor does it change my answer to your Question No. 3.

Very truly yours,

SI GARRETT

Attorney General

May 30, 1952

Hon. H. R. Leeman

Superintendent of Education

Morgan County

Decatur, Alabama

County Boards of Education — Schools — Traveling Expenses.

Members of the county board of education may be allowed the statutory compensation of \$7.50 per diem, and their actual traveling and hotel expenses, incurred not only in attending the regular and special meetings of the board held whenever and wherever the duties and the business of the board require, but also incurred while otherwise engaged in transacting the business of the board either within or without the county, not exceeding 24 days in any one fiscal year. Title 52, Section 68, Code of Alabama 1940, as amended by Act No. 667, General and Local Acts 1949, page 1031.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of May 1, 1952, is as follows:

"In accordance with our telephone conversation, I am formally requesting an opinion regarding the interpretation of Legislative Act No. 667, approved Sept. 19, 1949, concerning the compensation of the members of County School Boards of Education.

"The first part of the Act states that: 'The members of the county Board of Education shall receive from the public school funds of the county Seven Dollars and Fifty Cents a day and their actual travel and hotel expenses incurred in attending meetings of the Board, and transacting the business of the Board.' The second part of the Act is quoted as follows: 'The members of the County Board shall not be allowed pay for more than twenty-four days in any one year, and their expenses shall be paid in like manner as provided for the compensation of teachers.'

"The questions which we wish to ask regarding the interpretation of this Act are as follows:

"1. May County School Board Members be paid the per diem allowance of \$7.50 a day for trips made outside the county to visit other school systems, or the State Department of Education office in Montgomery, and may they be paid the per diem allowance for attending meetings of the State School Board Members' Association, which are held from time to time at various points throughout the state; provided, the total number of days for which a board member is paid does not exceed twenty-four?

"2. May County School Board Members be reimbursed for actual travel and hotel expenses incurred in making trips outside the county to

other school systems, to the State Department of Education office in Montgomery, or in attending meetings of the State School Board Members Association, which may be held from time to time in various locations throughout the state?

"3. May the number of trips or days for which a School Board Members' expenses are paid be permitted to exceed twenty-four days?"

In my opinion, your first and second questions shall be answered in the affirmative.

The general administration and supervision of the public schools of the county is vested in the county board of education. Title 52, Section 62, Code of Alabama 1940. Title to all property, estate, effects, money, funds, claims, and donations held for public school purposes are vested in the county board of education. Title 52, Section 71, Code of Alabama 1940.

Title 52, Section 66, Code of Alabama 1940, provides that the county board of education shall hold a special public meeting on the second Tuesday in May of each year. The expressed purpose of this meeting is to afford to the public an opportunity of presenting to the board matters relating to the allotment of public school funds, or any other matter relating to the administration of the public schools of the county.

Title 52, Section 67, Code of Alabama 1940, provides that the county board of education shall hold an annual meeting each year on the last Friday in November, and shall hold other regular meetings on the last Friday of February, May, and September. In addition to the five meetings aforementioned, Section 67, *supra*, provides that the board may hold such special meetings, and at such place, as the duties and the business of the board may require.

Title 52, Section 68, Code of Alabama 1940, as last amended by Act No. 667, General and Local Acts 1949, page 1031, provides, in part, as follows:

"The members of the county board of education shall receive from the public school funds of the county seven dollars and fifty cents a day and their actual traveling and hotel expenses incurred in attending meetings of the board, and transacting the business of the board. The members of the county board shall not be allowed pay for more than twenty-four days in any one year, and their expenses shall be paid in like manner as provided for the compensation of teachers"

While there is no limit upon the total number of regular and special meetings which the board may hold in any one year, there is a limit upon the total number of days for which members may be paid the per diem allowance (\$7.50) and their actual traveling and hotel expenses incurred in attending such meetings. Section 68, as amended, *supra*, fixes that limit at twenty-four days in any one year.

The said per diem allowance and the said allowance for traveling and hotel expenses are not, however, confined to payment of members for attending the regular and special meetings of the board. Section 68, as amended, *supra*, provides that the members shall receive allowances (a) in attending meetings of the board, and (b) in transacting the business of the board. Some of the business affairs of the board may be of such a nature that they cannot be handled at any of the regular or special meetings of the board. I think it clear that Section 68, as amended, *supra*, recognizes

that individual board members may be sent by the board on trips for the purpose of transacting the official business of the board. I think that this section clearly contemplates that such members shall receive the per diem allowance and their actual traveling and hotel expenses while engaged in such official duties, subject to the limitation that they shall not be allowed pay for more than twenty-four days in any one year.

The propriety and necessity of such travel must be determined by a majority of the board, which should not approve for payment claims for the per diem allowances and for traveling and hotel expenses made by individual members without authority of the board. See Title 52, Sections 67 and 70, Code of Alabama 1940. I suggest that the minutes of the board show the authorization and approval of travel by board members.

Section 67, *supra*, in addition to authorizing the board to hold such special meetings as the duties and the business of the board may require, provides that the board may hold its special meetings at such place as the duties and the business of the board may require. Its regular meetings should, without question, be held at the county seat, because the dates of those meetings are fixed by statute and the public may wish to appear and present matters relating to the administration of the schools. While most special meetings may also be held at the county seat, the law does not so require. The selection of the time and place for its special meetings is a matter addressing itself to the sound judgment and discretion of the board, subject to the requirement of the statute that the duties and the business of the board require the selection of that particular place, in preference to the county seat. Therefore, if the nature of the business at hand necessitates a special board meeting outside of the county, in my opinion the members of the board may be paid the per diem allowance of \$7.50, plus their actual traveling and hotel expenses incurred in attending the meeting.

In my opinion, your third question must be answered in the negative.

Section 68, as amended, *supra*, expressly provides that: "The members of the county board shall not be allowed pay for more than twenty-four days in any one year, . . ." This office has previously held that the meetings of the board should be counted from October 1, the beginning of the fiscal year. Biennial Report of Attorney General, 1934-1936, page 720. It has also been held that members cannot be paid expenses for a greater number of days than the number prescribed by statute. Biennial Report of Attorney General, 1928-1930, page 617; Biennial Report of Attorney General, 1926-1928, page 299. Since the statute says that the members "shall not be allowed pay for more than twenty-four days in any one year," in my judgment, this means that they shall not be paid either the per diem allowance (\$7.50) or their actual traveling and hotel expenses for more than twenty-four days in any one fiscal year.

Yours very truly,

SI GARRETT

Attorney General

May 30, 1952

Hon. J. W. Calhoun

Mayor of Cottonwood

Houston County

Cottonwood, Alabama

Municipalities — Officers and Offices— Police.

Where the chief of police was elected or appointed by the town council, the mayor may remove him for cause, and, pending a review of such action by the council at its next regular meeting, may fill the vacancy temporarily by the appointment of an acting successor, who is entitled to pay for services rendered.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of December 28, 1951, is as follows:

"I am the Mayor of the town of Cottonwood. On October 1, 1951, I discharged the Chief of Police, Mr. Sterling Hall, for reasons which I believed to be in the best interests of the Town of Cottonwood. I then appointed as his successor, Mr. W. A. Whitehead, to serve as Acting Chief of Police. The City Council next specially met on or about October 6, 1951 and considered by action in discharging the Chief of Police. The council unanimously voted to reinstate Mr. Sterling Hall as Chief of Police. The Council took the position: (1) that I, as Mayor, was without authority to discharge Mr. Hall, and (2) that I, as Mayor, was without authority to appoint his successor.

"Mr. Whitehead actually served as Chief of Police for five (5) days. Mr. Sterling Hall was also on duty as police officer during this five-day period. Mr. Whitehead has never been paid for his services. The question of paying him has been presented to the City Council, which has refused to approve payment to him for the said five days of his services. This refusal was made upon the ground that I, as Mayor, had no authority to hire him as Acting Chief of Police.

"I request your official opinion on the question whether the City Council of the Town of Cottonwood now has legal authority to order payment to Mr. Whitehead for his services, as Acting Chief of Police, during the said five-day period, said services being rendered by virtue of my appointment.

"I make no contention that I had the authority to appoint a permanent Chief of Police, but I do contend that I had the authority to discharge the Chief of Police and to appoint his acting successor, to hold office until the next meeting of the City Council, which would then have authority to confirm or reverse my appointment."

In my opinion, your inquiry should be answered in the affirmative.

The provision of Title 37, Section 407, Code of Alabama 1940, are as follows:

"The council may provide for a tax assessor, tax collector, chief of police, chief of the fire department and shall specifically prescribe their duties. The council shall designate the persons who shall administer oaths and issue warrants of arrest for violations of law and the ordinances of the city or town, and that persons authorized to approve appearance bonds of persons arrested."

Title 37, Section 441, Code of Alabama 1940, provides as follows:

"The mayor shall be the chief executive officer, and shall have general supervision and control of all other officers and the affairs of the city or town, except as herein otherwise provided; he shall have the power to appoint all officers, whose appointment is not otherwise provided for by law. He may remove any officer for good cause, except those elected by the people, and fill the vacancy caused thereof, permanently, if the appointment of such officer is made by the mayor, and temporarily, if such officer is elected by the council or appointed with its consent, in either of which last two cases, he must report such removal and his reasons therefor to the council at its next regular meeting, when, if the council shall sustain the act of removal by the mayor, by a majority vote of those elected to the council, the vacancy shall be filled as herein provided."

I conclude from your request that the chief of police was elected by the council under the authority therein vested by Section 407, *supra*. In such case he could be removed by the mayor for good cause, under the power and authority vested in the mayor by Section 441, *supra*. However, since the officer was elected or appointed by the council, and was not appointed by the mayor, such removal could be only temporary in character, the mayor's action being subject to review by the council at its next regular meeting.

Section 441, *supra*, provides that the mayor may temporarily fill the vacancy caused by his removal of a municipal officer elected or appointed by the council. Since the mayor duly appointed Mr. W. A. Whitehead to serve as acting chief of police, in my opinion the Town of Cottonwood has full legal authority to pay him for the five days during which he discharged his official duties in behalf of the town.

Very truly yours,

SI GARRETT

Attorney General

June 4, 1952

Hon. A. B. Jefferies, Chairman

Board of Revenue and Road Commissioners

Mobile County

Mobile, Alabama

Counties — Boards of Equalization — Mobile County.

In counties having a population of one hundred forty thousand or more, it is the duty of the county governing body to furnish reasonable compensation for transportation to employees of the respective county boards of equalization for transportation expenses actually incurred in the performance of official duties.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of March 1, 1952, is as follows:

"Your official opinion is hereby requested as to the right, power and duty of the Governing Body of Mobile County insofar as the following claim is concerned.

"One W. W. Boyles, an appraiser under appointment of the Board of Equalization of Mobile County through the local Merit System Act, has filed a claim with Mobile County claiming mileage on a private automobile used by the appraisers for the Board of Equalization for and during the period beginning January 9, 1952, through January 31, 1952, the mileage stated being 369 miles for which reimbursement as expenses is claimed at 6c per mile, making a total of \$22.14.

"The question therefore now asked of you is whether or not Mobile County may lawfully, or is required to pay this or any similar claim after appropriate audit thereof.

"This particular claim was submitted to the attorney for this Board who has rendered an opinion advising that such claims may legally be paid after due verification and substantiation thereof and for your information I am enclosing herewith a copy of such opinion."

In reply to your inquiry, your attention is invited to the provisions of Title 51, Section 95, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693, which are in pertinent part as follows:

"Section 95. HOW COMPENSATION PAID.—The county board of equalization of any county is hereby authorized and empowered to employ such appraisers, engineers, stenographers, clerks or assistants as may be necessary for the performance of the duties which may be required of said boards of equalization, subject however to all the provisions of any merit system law now or hereafter in effect in said county; ...In all counties having a population of one hundred forty thousand or more according to the last or any subsequent federal census, it

shall be the duty of the courts of county commissioners, or other like governing bodies of such counties in this state, to furnish and supply the county boards of equalization with adequate office space, necessary furniture and equipment, all necessary books, maps, stationery, and printed blanks; and transportation or reasonable compensation for transportation expense actually incurred in performance of official duties."

The provisions of Section 95, as amended, *supra*, give express authority to the county boards of equalization to employ various personnel including an appraiser such as the one in question.

In counties having a population of one hundred forty thousand or more, Section 95, as amended, *supra*, makes it the express duty of the county governing body to furnish the county board of equalization various items of equipment and supplies as enumerated therein, and also to furnish **"transportation or reasonable compensation for transportation expense actually incurred in performance of official duties."** (Emphasis supplied.)

The population of Mobile County is, according to the 1940 Federal Census, in excess of one hundred forty thousand.

The only reasonable construction of Section 95, as amended, *supra*, is that this duty of the county governing body as above set out, includes the furnishing of office space, furniture, equipment, supplies, and transportation as enumerated therein, not only for the actual members of the board of equalization, but also for the employees of the board.

It is, therefore, my opinion that the governing body of Mobile County must pay an employee of the Mobile County Board of Equalization expenses incurred for transportation, when such expenses are found to be reasonable, and are actually incurred in the performance of official duties.

Yours very truly,

SI GARRETT

Attorney General

June 11, 1952

Brigadier General Walter J. Hanna

The Adjutant General

State of Alabama

Montgomery 2, Alabama

Armory Commission — Appropriations — Budget Act.

The appropriation to The Armory Commission made by Act No. 764, General and Local Acts 1951, page 1332, of \$120,000 for each of the fiscal years ending September 30, 1951, and September 30, 1952, for the purpose of providing additional armory facilities, is a continuing appropriation, and does not revert to the State Treasury at the end of the fiscal year under the provisions of Title 55, Section

104, Code of Alabama 1940; and such appropriation continues until the attainment of the object for which appropriated. The whole or any part of such appropriation may, conditional upon the condition of the Treasury and the approval of the Governor, be withdrawn from the general fund and deposited in trust in The Armory Commission Fund, and there held until used for the purpose specified by Act No. 764, supra.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of April 1, 1952, is as follows:

"Reference is made to Act No. 764 (S. 530-Phillips), of the 1951 Session of the Legislation of Alabama, approved September 11, 1951, which made a conditional appropriation to The Armory Commission of Alabama of \$120,000 for each of the fiscal years ending September 30, 1951 and September 30, 1952, for the purposes stated in the act. Reference is also made to Section 104, Title 55, Code of Alabama (1940) as amended, and particularly the second sentence thereof.

"No use, allotment, or obligation has been made of or against the conditional appropriation made for either of the fiscal years mentioned under the provisions of the above mentioned appropriation act, nor has any action been taken as yet to obtain the approval of the Governor for any use of such funds. A question has been raised by the State Budget Officer, Department of Finance, as to the legal availability now of the conditional appropriation made for the fiscal year which ended September 30, 1951, on the theory that the appropriation for that fiscal year lapsed at the end of the fiscal year. It has been my understanding that the conditional appropriations made by the above mentioned act are continuing appropriations available, subject to the approval of the Governor, until the attainment of the object or the completion of the work for which such appropriations were made, under the provisions of the last sentence of Section 104, Title 55, cited above.

"On behalf of The Armory Commission of Alabama, of which I am an ex officio member and also the Secretary, and being charged at present with the routine administration of the affairs of the Commission, I hereby request your opinion as to the following questions relative to the above mentioned appropriation act:

"a. Are the conditional appropriations made by the act of September 11, 1951, for the fiscal years ending September 30, 1951 and September 30, 1952, continuing appropriations until the attainment of the object or the completion of the work for which such appropriations were made, subject to the approval of the Governor and conditional upon the condition of the Treasury?

"b. In particular, if the Governor finds that the condition of the Treasury will permit and grants his approval, is the \$120,000, or any part thereof, conditionally appropriated for the fiscal year September 30, 1951, still available to The Armory Commission of Alabama for the purpose stated in the act, even though that fiscal year is now ended?

"c. If the condition of the Treasury is found to permit and the

Governor grants his approval for the use of all or any portion of the appropriations made by the above mentioned act, can the funds thus made available to The Armory Commission be paid over to The Armory Commission of Alabama in one or more lump sums, by transfer from the General Fund to The Armory Commission Fund maintained as a Trust Fund by the State Treasurer, or must the sum so made available be paid out only as actually used? (In this connection attention is invited to Section 190, Title 35, Code of Alabama (1940) as amended).

"The purpose for which the above mentioned constitutional appropriations were made is set forth in the second sentence of the act, which reads as follows: 'The foregoing appropriations shall be used only for providing additional armory facilities required by Alabama National Guard units and Headquarters, including the matching of Federal funds made available to the State on the matching basis for such purpose.' The background explanation of the appropriation is as follows: a large number of additional armories, and the expansion and improvement of a number of existing armories, is urgently needed by the Alabama National Guard, and similarly by the National Guards of the other States. For a number of years the National Guard Association of the United States and The Adjutants General Association of the United States have been working to obtain Federal legislation and appropriations to assist the States in the construction of such additional armory facilities. Enabling legislation was enacted by the Congress in 1950, and an initial appropriation was made by the Congress for the Federal fiscal year commencing 1 July 1951. These funds are expected to be made available to the States in the very near future on a matching basis. To put The Armory Commission of Alabama in a financial position of readiness to accept and match such Federal funds expected to be offered it, the 1951 Session of the Legislature was requested to make an appropriation, and the above mentioned conditional appropriation act was the Legislature's response to that request. It is now time to request the Governor to make the above mentioned funds available to The Armory Commission.

"You will note that the second sentence of the appropriation act specifically states that it shall be used only providing for additional armory facilities, including the matching of Federal funds for such purpose. Such additional armory facilities can be provided only by construction since appropriate armory facilities are not commercially available; therefore, the appropriation is obviously for the purchase of necessary lands or the erection of buildings or new construction, and hence my opinion that the appropriation is a continuing one.

"If and when the Governor makes funds available to The Armory Commission under the above appropriation act, the most practical mechanics of handling such funds is to transfer them immediately in a lump sum to The Armory Commission Fund, a Trust Fund in the State Treasury. Thereafter, as actual expenditures are made, they will be vouchered against this Trust Fund in the usual manner, upon certification of the authorized agent of The Armory Commission (at present myself) and subject to approval of the Governor, who is Chairman of The Armory Commission. This is particularly desirable since it is necessary for The Armory Commission to know definitely what funds are available to it so that it can program joint usage of such State funds and matching Federal funds, which it can only do by having those funds definitely and irrevocably transferred to its control and accounts."

In my opinion, your first and second questions should be answered in the affirmative.

In answer to your third question, it is my opinion that the funds appropriated by Act No. 764, General and Local Acts 1951, page 1332, conditional upon the condition of the Treasury and the approval of the Governor, may be paid over to the Armory Commission of Alabama in one or more lump sums, by transfer from the General Fund to The Armory Commission Fund maintained as a trust fund by the State Treasurer, and may be there held until used in the attainment of the object for which such funds were appropriated by Act No. 764, supra, namely, for providing additional armory facilities.

Act No. 764, supra, appropriates to The Armory Commission of Alabama, from any funds in the State Treasury not otherwise appropriated, the sum of \$120,000 for each of the fiscal years ending September 30, 1951, and September 30, 1952, **conditional upon the condition of the Treasury and the approval of the Governor.** The Act expressly provides that the said appropriation shall be used **only for providing additional armory facilities** required by Alabama National Guard units and headquarters, including the matching of Federal funds made available to the State on a matching basis for such purpose.

Therefore, the expenditure of the said appropriation is expressly limited to the providing of additional armory facilities, which may or may not involve the purchase of land, and which necessarily involve the erection of buildings or new construction. The appropriation itself is not made outright, but is conditional upon (a) the condition of the Treasury, and (b) the approval of the Governor.

Title 55, Section 104, Code of Alabama 1940, provides as follows:

"All unencumbered balances of all appropriations shall revert to the state treasury at the end of each fiscal year and to the credit of the general fund or the special fund from which the appropriation or appropriations were made. **Appropriations for the purchase of land or the erection of buildings or new constructions shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made.**" (Emphasis supplied.)

In the case of **Southern Industrial Institute v. Lee**, 234 Ala. 404, 175 So. 365, the court said:

"We have previously referred to the fact that this appropriation is expressly subject to the Governor's approval. He it is who supervises the State's finances, and there was no inconsistency whatever in the Legislature leaving this particular appropriation unaffected by the Budget Act, as the treasury of the state was well guarded the one way as the other, and by the same high authority. And until released by the Governor, it is not proper claim for presentation to the comptroller, and, therefore, is not such an 'unpaid appropriation' as is referred to in article 23 of the Constitution Amendments (see Gen. Acts 1933, Ex. Sess., p. 196)."

Since the appropriation in question was a special appropriation for a specific purpose, namely, one for the purchase of land or the erection of buildings or new construction, this evinces a legislative policy that appropriations of this character should not lapse, but that the work should be completed, as pointed out in **Southern Industrial Institute v. Lee**, supra. See, also, **In re**

Opinion of the Justices, 234 Ala. 555, 176 So. 367, which concludes that this type of appropriation is not such an appropriation affected by the Budget and Financial Control Act (Title 55, Sections 92-107, Code of Alabama 1940).

Very truly yours,

SI GARRETT

Attorney General

June 11, 1952

Hon. A. L. Spence, Chairman

Board of Revenue

Limestone County

Athens, Alabama

Counties — Limestone County — Publications — Funds.

1. The maximum rate that can be paid for publication of receipts and expenditures of the general fund of Limestone County is fifty dollars per quarter.

2. The maximum rate that can be paid for the publication of receipts and expenditures of all county funds of Limestone County, except the general fund, is one and one-half cents per word.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of November 1, 1951, is as follows:

"A question has arisen as to the rate to be paid for publishing quarterly reports of receipts and disbursements of the General Fund of Limestone County, of the Gasoline Fund of Limestone County and other reports required to be published.

"Local Act No. 409, approved July 17, 1931, is the Act under which we have been publishing our reports. Title 12, Section 22, Code of 1940, is the General law dealing with publication of these reports. It contains a provision that the cost will not exceed 1½c per word in counties of less than 40,000 population. Limestone County has less than 40,000 population according to the 1950 Census.

"Title 7, Section 718, Code of 1940, as amended by General Act No. 723, 1951 Legislature sets out the rate for legal publications in general. Our local newspaper has billed us at the rate of 2c per word for the first publication contending that Act. No. 723 above has altered the provisions of Local Act No. 409 above.

"Can Limestone County lawfully pay this claim or are we limited to the 1½c rate fixed by Title 12, Section 22?"

"As bearing on the solution, I refer to report of the Attorney General, Quarterly Report July-September, 1938, page 87, and Report of the Attorney General July-September 1940, page 54."

In answer to your inquiry it is necessary to point out the distinction between the field of operation of the provisions of Title 7, Section 718, Code of Alabama 1940, as amended by Act No. 723, General and Local Acts 1951, page 1275, and Title 12, Section 22, Code of Alabama 1940.

Section 718, as amended, *supra*, provides:

"Not more than two cents per word for the first insertion, and one and one-half cents per word for each subsequent insertion of a legal notice or advertisement must be charged or allowed; but in case it is advisable to advertise in daily newspapers, any person required to advertise such notice may contract with such papers to charge their current published commercial rates, and the insertion must not be oftener than once a week, unless in certain cases of sales under a decree of the circuit court in equity, the court shall otherwise order. Each amount or number expressed in figures and each initial letter shall constitute one word. The year, month, and day shall each constitute one word, in all three words. In estimating the number of words in a notice, an appropriate caption may be included; but no memorandum of the printer must be included." The provisions of Section 22, *supra*, are as follows:

"§ 22. Publication of receipts and disbursements.— The courts of county commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first days of April and October of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended. Said publication must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of the outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable. The compensation to be paid for the publication herein provided for shall not exceed one and one-half cents per word, in counties of less than forty thousand population."

It is to be noted that the provisions now codified as Section 718, as amended, *supra*, and Section 22, *supra*, appeared in the Code of 1876, and have been included, as changed by the several amendments to each, separately in every subsequent Code. The field of operation of these sections must then be separate.

In Quarterly Report of Attorney General, Vol. 17, page 237, it was held that Section 9262 of the 1923 Code (Section 718, as amended, *supra*) applies only to legal notices or advertisements. The report as required by Section 22, *supra*, is neither a notice nor an advertisement as such, but is a statement of the receipts and expenditures from the various funds of the county.

In an opinion of this office rendered to Hon. Edgar Underwood, Judge of Probate, Franklin County, under date of September 29, 1951, Quarterly Report of Attorney General, Vol. 64, page 66, it was held that the provisions

of Section 22, supra, requires a semi-annual publication in respect to all county funds, and that the maximum rate that can be paid for such publication in a county having a population of less than 40,000 is one and one-half cents per word.

Act No. 723, supra, specifically amends **only** Section 718, supra. This act, therefore has no effect upon Section 22, supra, which provides for the rate to be paid for the publication of county funds.

Act No. 409, Local Acts 1931, page 182, provides in pertinent part as follows:

"Section 1. That the Court of County Commissioners, board of revenue, or like governing body of Limestone County is hereby required to publish between the first and fifteenth days of January, the first and fifteenth days of April, the first and fifteenth days of July, and the first and fifteenth days of October, of each year in some newspaper published in said county to be designated by a majority of the said governing body an itemized statement of all receipts and expenditures of the general fund of said Limestone County, the cost of said publication not to exceed Fifty Dollars per quarter; that a separate quarterly publication shall be made of the receipts and expenditures of the road and bridge funds of said county during the first fifteen days of January, April, July and October of each year in some newspaper published in the town of Athens, Alabama, designated by a majority of the said court of county commissioners, board of revenue or like governing body of said county, the cost not to exceed the legal rate for such publication.

"Section 2. That the quarterly publications above provided for shall be in lieu of the semi-annual publication now provided for by law.

"Section 4. That all laws and parts of laws in conflict with the provisions of this law are hereby repealed."

This act requires a quarterly report of the general fund and road and bridge funds of Limestone County to be made separately in lieu of the semi-annual report required by Section 22, supra. It also provides that the cost of the publication of the general fund shall not exceed fifty dollars per quarter, and the cost of the publication of the road and bridge funds shall not exceed the legal rate for such publication.

The legal rate for the publication of receipts and expenditures of all county funds in a county with a population of less than 40,000 is, as above pointed out, provided for in Section 22, supra, is being one and one-half cents per word.

It is, therefore, my opinion that the legal rate which may be paid for the publication of the receipts and expenditures of the general fund of Limestone County is an amount not exceeding fifty dollars per quarter, and one and one-half cents per word for the publication of the receipts and expenditures of all other funds of Limestone County.

Yours very truly,

SI GARRETT

Attorney General

June 17, 1952

Hon. M. E. Cannon, Treasurer

Board of Revenue

Covington County

Andalusia, Alabama

Sheriffs — Costs and Fees — Counties — Fine and Forfeiture Fund — Registration.

1. The sheriff is entitled to receive a fee of 65c for serving a notice upon an elector whose name is proposed to be stricken from the registration list.

2. The fee for serving such notice is payable out of the general fund of the county, and not from the fine and forfeiture fund; and the claim for such fee should be audited and allowed by the county governing body.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 22, 1952, is as follows:

"The sheriff has presented a claim to the Board of Revenue for payment of his fees for serving notice on electors to show cause why their names should not be stricken from the registration list; see Section 34, Title 11, Code of Alabama 1940.

"Please give me your official opinion on the following questions:

"1. Can the County legally pay this claim out of the General Funds of the County?

"2. Can the County legally pay this claim out of the Fine and Forfeiture Fund of the County?

"3. If your answer to the above questions are in the negative, from what source can the sheriff be paid for this work?"

to in your inquiry, out of the general fund of the county.

In my opinion, the county may legally pay the sheriff's claim, referred

Title 17, Section 46, Code of Alabama 1940, provides a method whereby an elector's name may be stricken from the registration list. Section 46, supra, requires that when it is proposed that a name of an elector be stricken, unless he or she is dead or a nonresident, notice shall be issued to him or her by the board, citing him or her to appear before the board and show cause why his or her name should not be stricken from the list. Section 46, supra, further requires that the sheriff serve the notice upon the registered elector whose name is proposed to be stricken.

The schedule of fees for sheriffs (Title 11, Section 34, Code of Alabama 1940) provides that sheriffs shall receive the following fee for the following service:

"For serving notice upon elector to show cause why his name should not be stricken from registration list 65"

It is the duty of the sheriff to serve such notice, and a fee in the amount of 65c is provided for serving such notice. I find no such specific statute whereby the Legislature has directed that this fee shall be paid out of the fine and forfeiture fund. In the absence of such specific provision directing that this fee be paid from the fine and forfeiture fund, it is my opinion that the county governing body may audit and allow the sheriff's claim, and pay it out of the general fund of the county not otherwise appropriated.

Yours very truly,

JOHN GARRETT

Attorney General

June 17, 1952

Hon. Roy O. Hill, Clerk

Law and Equity Court

Houston County

Dothan, Alabama

Houston County — Inferior Courts — United States — Banks
and Banking — Trial Tax — Exemptions.

National banks are exempt from trial tax chargeable in the Inferior Court of Houston County.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 25, 1952, is as follows:

"In Attorney General's Opinions 1934-36, Page 711, it was ruled that a national bank is exempt from State Trial Tax of \$3.00. Acting under this opinion, an attorney for the Alabama National Bank of Montgomery has refused to pay a trial tax of \$3.00 in THE HOUSTON LAW AND EQUITY COURT. Authority for collecting this trial tax in The Houston Law and Equity Court is found in Local Acts 1947, Page 229, Section 7(c), where it reads as follows: ' . . . In every other civil action at law . . . a trial tax of three dollars shall be collected for the use of the county.'

"Please advise me if national banks are exempt from the trial tax as set out in THE HOUSTON LAW AND EQUITY COURT."

The local act referred to in your inquiry was amended by Act No. 358, General and Local Acts 1949, page 533. The provision governing the payment of trial tax in the Inferior Court of Houston County is as follows:

"(c) A trial tax of one dollar (\$1.00) shall be collected for the use of the county in each civil action at law, if the sum of controversy does not exceed one hundred (\$100). In every other civil action at law, in every suit in equity, and in every criminal case except criminal cases involving offenses of which justices of the peace have final jurisdiction, a trial tax of three dollars (\$3.00) shall be collected for the use of the county."

As stated in your inquiry, this office has held that national banks are exempt from the payment of trial tax in Alabama. Biennial Report of Attorney General, 1934-36, page 711. See also opinion of this office appearing in Quarterly Report of Attorney General, Vol. 37, page 42, holding that the Disaster Loan Corporation, being a Federal instrumentality, is not required to pay trial tax. These opinions, exempting Federal instrumentalities from the payment of a revenue producing trial tax, are based upon the theory that the State cannot tax the Federal Government. It is my view that these opinions are controlling, and that your inquiry must be answered in the affirmative; that is to say, national banks are exempt from the trial tax, otherwise chargeable in the Inferior Court of Houston County.

Yours very truly,

SI GARRETT

Attorney General

June 17, 1952

Honorable Jess Owens, Sheriff

Etowah County

Gadsden, Alabama

Intoxicating Liquors — Condemnation Proceedings — Bonds.

1. Where a bond is executed to retain possession of a vehicle seized by an officer of the State, under the provisions of Title 29, Section 247, Code of Alabama 1940, as amended by Act No. 129, General Acts 1947, page 39, and the bond meets the requirements of Title 29, Section 249, Code of Alabama 1940, it should be approved even though condemnation proceedings have not been instituted.

2. No replevin or detinue writ may be employed to retake possession of such seized property pending the forfeiture suit. The sheriff is without authority to release such property pending the condemnation proceedings unless a bond with good and sufficient surety is executed in double the value of said property.

3. Where a vehicle is seized under the provisions of Title 29, Section 247, Code of Alabama 1940, as amended by Act No. 129, Gen-

eral Acts 1947, page 39, and the defendant or claimant duly executes a bond as provided in Title 29, Section 249, Code of Alabama 1940, the fact that the vehicle was again seized for transporting liquors does not prevent the execution of an additional bond to retain possession of the property in the second suit.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 21, 1952, is as follows:

"1. Where, under the provisions of Title 29, Section 247, Code of Alabama 1940, a vehicle is apprehended on a charge of transportation of illegal liquors or beverages by either the sheriff or the city police, may the owner of such vehicle or a person having a claim against such vehicle post the bond provided for in Title 29, Section 249, Code of Alabama 1940, before condemnation proceedings have been actually filed in the Equity Court; or am I authorized to refuse to accept such a bond until such proceedings have been filed? If, in the event I refuse to accept such a bond before proceedings are filed, will a detinue suit brought by the owner of the car lie against me; or will I be liable to the owner for so refusing?

"2. Where a vehicle has been apprehended under the provisions of said Section 247, et seq., in the event this same vehicle is apprehended another time under said provisions, is it permissible for a defendant or claimant to post such bond before a decree is rendered in the first condemnation proceedings?

"3. Where such a vehicle is apprehended under said statutory provisions and in the event the solicitors delivers to me a written request to release said vehicle without bond before any condemnation proceedings are filed, is the sheriff required by law to so release said vehicles; or may he hold said vehicle until condemnation proceedings are filed and the case adjudicated?"

Whenever a conveyance is seized by an officer under the provisions of Title 29, Section 247, Code of Alabama 1940, as amended by Act No. 129, General Acts 1947, page 39, the defendant in the proceedings, or the claimant of the property, shall have the right to execute a bond in double the value of such property, with good and sufficient surety; and upon the execution of such bond, the sheriff shall deliver the property to the defendant or claimant. Title 29, Section 249, Code of Alabama 1940.

Section 249, *supra*, expressly authorizes the execution of a bond which may be executed immediately after the vehicle is seized. It is my opinion that, if the board meets the requirement of the statute, it should be approved even though condemnation proceedings have not been instituted.

Title 29, Section 248, Code of Alabama 1940, states that it shall be the duty of the prosecuting officer in the county to institute condemnation proceedings at once. I do not believe you are authorized to refuse to accept a bond which meets the requirements of Section 249, *supra*, even though condemnation proceedings have not been instituted.

It is your duty as sheriff to approve a bond, if that bond meets the requirements set out in Section 249, supra, and for any willful failure or neglect on your part to perform the duties of sheriff, you may be liable on your official bond, and also liable in a civil action to the extent of injuries proved as a direct and proximate result of your failure to perform such duties.

Of course, Section 249, supra, provides that the bond shall be in double the value of the property, with good and sufficient surety, and shall be approved by the sheriff or register of the circuit court. It is within your discretion to disapprove or refuse to accept a bond that does not meet these requirements. For you to arbitrarily refuse to accept such a bond with no valid grounds for doing so, in my opinion, would be a failure on your part to perform your official duty.

No replevin or detinue writ may be employed to retake possession of such seized property pending the forfeiture suit. Section 248, supra.

Your second inquiry is answered in the affirmative.

A defendant or claimant may execute a bond immediately after the vehicle is seized. Where a vehicle is seized under the provisions of Section 247, as amended, supra, and the defendant or claimant duly executes a bond as provided in Section 249, supra, the fact that the automobile was again seized for transporting liquors does not prevent the execution of an additional bond to retain possession of the property in the second suit. Of course, the bond filed in the first suit would not be sufficient to allow the defendant or claimant to retain possession of the automobile pending the second suit. Quarterly Report of Attorney General, Vol. 63, page 90.

The fact that a decree had not been rendered in the first condemnation proceeding, would not bar the execution of a second bond to retain possession of the property pending the second condemnation proceeding. If the defendant desires to retain possession of the automobile, he would be required to file another bond.

In answer to your third inquiry, you are advised that I find no authority for the release of property seized under the provisions of Section 247, as amended, supra, other than provided in Section 249, supra.

Property seized under Section 247, as amended, supra, is contraband, and is subject to forfeiture to the State of Alabama. In my judgment, you are without authority to release such property pending the condemnation proceedings, unless a bond is executed in double the value of said property.

Section 247, as amended, supra, further provides that the officer making the seizure shall report the seizure and the facts connected therewith to the solicitor or any prosecuting official in the county where the seizure is made, or in default thereof, to the Attorney General of the State.

You are not required by law to release property seized for transporting liquor in violation of Section 247, as amended, supra, pending condemnation proceedings, unless sufficient bond is executed.

Yours very truly,

SI GARRETT

Attorney General

June 18, 1952

Hon. Fred R. McClendon, Member
Board of Revenue and Control
Shelby County
Columbiana, Alabama

Counties — Travel Expenses — Shelby County.

1. Under Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts of 1939, page 1049, (Title 12, Section 28, 1951 Cumulative Pocket Part, Code of Alabama 1940), members of the Board of Revenue and Control of Shelby County should be compensated for mileage when discharging their duties as set forth by Section 28, Act No. 179, General and Local Acts 1949, page 206, provided transportation is not furnished by the county.

2. The County Engineer of Shelby County, as custodian of all road tools, machinery, supplies, and equipment, may assign county automobiles or pickup trucks to the members of the Board of Revenue and Control for their use in inspecting roads, and for other official business.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of February 16, 1952, is as follows:

"The Board of Revenue and Control for Shelby County, Alabama is presently operating under Local Act No. 179, approved July 6, 1949, and shown on Pages 206 through 212 of the Acts of Alabama for the regular session of 1949, and said Board is operating under other general laws applicable thereto. As certain portions of said Local Act have never been construed, said Board desires to have your office give us certain information regarding the operation of said Board under said act and the general laws pertaining thereto. We would very much appreciate your opinion on the following:

"(1) Is there any method in said Act No. 179 approved July 6, 1949, and shown on Pages 206 through 212 of the Acts of Alabama for the regular session of 1949 or any other Acts or provisions of law by which the members of said Board can be compensated for mileage while engaged in inspecting the roads of Shelby County or while engaged in any other official business?

"(2) Does Section 23 of said Local Act No. 179, approved July 6, 1949, and shown on Pages 206 through 212 of the Acts of Alabama for the regular session of 1949 require that automobiles or pickup trucks presently available to said members of said Board be turned over to the County Engineer of said county?

"(3) In the event you rule that said automobiles or pick-up trucks inquired about in the next preceding paragraph should be turned over

to said County Engineer, then is there any provisions in said Local Act No. 179 or any other acts or laws which would permit said County Engineer to assign said automobiles or pick-up trucks to said members of said Board to be used only on official business. It is respectfully pointed out that the County Engineer has his offices and headquarters in Columbiana. It is further pointed out that each member of said Board is charged with the duty of inspecting the roads of his District, from time to time and hear the suggestions and complaints of the citizens and report the same to the Board with his recommendations, to advise with the County Engineer concerning the problems of his District particularly and to assist in securing rights of ways and assist in public relations generally. Said members are further charged with the duties of directing and controlling the property of said County and of performing the other duties set out by Chapter 2 of Title 12 of the Alabama Code of 1940. Each of said members of the Board is required to live in his own District and this results in each one living away from the county seat in Columbiana. In order for the members of the Board to carry out their said duties, it is necessary that they do extensive traveling in their District and to and from said county seat. If it is ruled that they cannot be compensated or that they cannot have an automobile or pick-up truck assigned to them, it will be necessary for them to travel at their own expense."

1. I am of the opinion that your first inquiry should be answered in the affirmative. Section 28, of Act No. 179, General and Local Acts of 1949, page 206, provides as follows:

"It shall be the further duty of each Associate Member of the Board to inspect the roads of his district from time to time, and hear the suggestions and complaints of the citizens, and report the same to the Board with his recommendations; to advise with the County Engineer concerning the problems of his district, particularly; and to assist in securing rights-of-way, and assist in public relations generally."

Section 6771, Code of Alabama 1923, as amended by Act. No. 662, General Acts 1939, page 1049, (Title 12, Section 28, 1951 Cumulative Pocket Part, Code of Alabama 1940), reads as follows:

"Each member of the Court of County Commissioners, or Board of Revenue, in each of the several counties of the State of Alabama shall be paid for their services the sum of \$4.00 per day while occupied in the discharge of their duties as such member of the Court of County Commissioners or Board of Revenue, and 5c per mile in going to and returning from their respective courts, and the sum of \$4.00 per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing any of the County bridges or County buildings, roads or works, and 5c per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the County Treasury on the order of the Court of County Commissioners, or Board of Revenue. No allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order by the Commissioners Court previously made. The per diem and mileage of such member for services rendered when letting out, inspecting and accepting, building, or repairing any of the County bridges, roads or works, shall be paid out of any money in the County Treasury, which shall be designated and set apart by the Commissioners Court, or Board of Revenue of their respective Counties for the payment thereof. Provided, that this Act shall not operate to repeal any local law affecting any county with respect to the matters contained in this Act."

Section 6 of Act No. 179, *supra*, provides that the members of the board shall receive an annual salary of fifteen hundred dollars per year, in monthly installments. Therefore, the \$4.00 per day, as fixed by Section 6771, as amended *supra*, does not apply. It is to be noted that Section 6 of Act No. 179, *supra*, does not provide that the fifteen hundred dollars per annum shall be **in lieu of all fees, per diem, expenses or other compensation now allowed by law**. Here there is not presented the same situation that exists in Lauderdale County, which was considered in Quarterly Report of Attorney General, Vol. 59, page 135, where the pertinent part of Section 6 of Act No. 171, General and Local Acts 1949, page 198, expressly provided that, "Each County Commissioner shall receive a monthly salary of not exceeding TWO HUNDRED FIFTY DOLLARS each month, to be fixed from time to time by the Court of County Commissioners, which salary shall be **in lieu of all fees, per diem, expenses or other compensation now allowed by law** to such Commissioner for services rendered in and about his duties as such Commissioner . . ." (Emphasis supplied).

Therefore, under the authority of Section 6771, as amended, *supra*, it is my opinion that members of the Board of Revenue and Control of Shelby County, while occupied in the discharge of duties imposed by Section 28 of Act No. 179, *supra*, should receive 5c per mile for each mile necessarily traveled by them in so doing, provided they are not furnished transportation by the county.

2. An answer to your second inquiry is given hereinafter in my discussion of your third inquiry.

3. I am of the opinion that your third inquiry should be answered in the affirmative. Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, defines the general authority of the county governing body, and reads in part as follows:

"The court has authority: 1. to direct and control the property of the county as it may deem expedient according to law, . . ."

Title 23, Section 43, Code of Alabama 1940, defines the specific authority of the county governing body with respect to roads, bridges, and ferries, and provides in part as follows:

" . . . Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of **unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries** in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state . . ." (Emphasis supplied.)

Section 23 of Act No. 179, *supra*, reads as follows:

"The County Engineer shall be the custodian of all road tools, machinery, supplies and equipment of Shelby County, and he shall be accountable for the same, at all times. The board shall furnish the necessary storage facilities in which to keep said tools, machinery, supplies and equipment, and the County Engineer shall keep on files in his office, at all times, an up-to-date inventory, containing a list of all said tools, machinery, equipment and supplies belonging to Shelby County."

Under Section 12, *supra*, all county property is under the general control of the county governing body, including its mobile equipment. Under Section

43, supra, the county governing body has unlimited jurisdiction and powers as to the construction of roads, bridges and ferries, and this section necessarily implies that it has similar authority as to the use and control of the county's road building equipment. I am of the opinion, therefore, that it was not the intention of the Legislature, when enacting Act No. 179, supra, to divest the county governing body of this inherent control and place the same in the county engineer. In my judgement, the Legislature intended that general control of the county property should remain in the county governing body and intended to make the county engineer custodian of certain property, including mobile equipment, merely for a better and a more convenient check on such property and equipment. Since the county has a limited amount of machinery and equipment, such machinery and equipment must be transferred from one district for use in another district or districts. Presumably, the Legislature contemplated that, where the care and custody of such machinery and equipment is placed in one person, to wit, the county engineer, his single responsibility would contribute to more efficient use, operation, and maintenance of such machinery and equipment.

I am, therefore, of the opinion that the county engineer may assign cars or pickup trucks to members of the county governing body for their use in inspecting roads and for other official business, notwithstanding the fact that Section 23 of Act No. 179, supra, makes him custodian thereof.

Very truly yours,

SI GARRETT

Attorney General

June 18, 1952

Hon. Bradley Brown, Director

Department of Revenue

Jefferson County

Birmingham, Alabama

Licenses — Accountants and Accounting — Words and Phrases.

1. A bookkeeper whose duties are confined to keeping an established set of books, and furnishing routine financial statements, is not subject to the license levied under Title 51, Section 453, Code of Alabama 1940.

2. A bookkeeper, as so defined, does not fall within the definition of either an actuary, auditor, or public accountant.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of April 2, 1952, is as follows:

"There are several persons here in Jefferson County engaged in the business of bookkeeping service, or holding themselves out as public bookkeepers. Their method of doing business is that they actually keep books for several concerns. Some of them maintain offices and bring the books of their clients to their office; others go to the different clients' place of business and do the posting, etc. These people take the position that they are not liable for license as levied under Section 453, Title 51, Accountants, etc.

"I have checked several dictionaries and find the following definitions.

"Accountants

1. One who is skilled in, keeps, or adjusts accounts.
2. A rendered; a calculator.

"Actuary

1. A registrar or clerk.
2. Clerk; keeper of accounts.

"Auditor

1. A person authorized to audit or examine accounts.

"Accounting

1. A record or reckoning of money transactions.
2. A balanced statement of receipts and expenditures during a given period.
3. A statement of assets and liabilities at a given date.
4. A series of items occurring under any one heading in the ledger of a business concern.

"It appears to me from the above quoted definitions that these persons who call themselves bookkeepers are actually accountants or auditors, and would be liable for license as levied under the above mentioned section. However, before taking any action to collect this license, I would appreciate an official opinion from you."

The license statute under consideration, Title 51, Section 453, Code of Alabama 1940, provides in pertinent part as follows:

§ 453. ACTUARIES, AUDITORS AND PUBLIC ACCOUNTANTS.—Each professional actuary, auditor, or public accountant, twenty-five dollars to the state, but no license shall be paid to the county...."

I have been unable to find any court decisions or other authority in Alabama, or elsewhere, which would expressly answer your question.

It is generally accepted that bookkeeping is one of the fields or functions of accounting, and possibly the most fundamental one. This does not necessarily mean, however, that a bookkeeper is an accountant or, even if he works for more than one employer, a public accountant.

It is the consensus of accountants generally that there is a distinction between a bookkeeper and an accountant, and the public seems to share this opinion. Where there is nothing to indicate to the contrary, words in a statute will be given the meaning which is generally accepted in popular, every day usage. *State v. Wertheimer Bag Company*, 253 Ala. 124, 43 So. 2d 824; *Hamilton v. City of Anniston*, 348 Ala. 396, 27 So. 2d 857; *Henderson v. Troy Bank & Trust Company*, 250 Ala. 456, 34 So. 2d 835; *Ex parte pepper*, 185 Ala. 284, 64 So. 112.

Such a distinction is recognized in American jurisprudence:

"...A public accountant has been defined as one who furnishes accounting or auditing service—as distinguished from bookkeeping—on a fee basis, per diem, or otherwise, for more than one employer." 10 Am. Jur., *Certified Public Accountants*, page 517; *Frazer v. Shelton*, 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086.

This definition not only serves the purpose of distinguishing between a bookkeeper and an accountant, but also clearly defines a public accountant.

Webster's New International Dictionary, 2nd Edition, page 309, defines bookkeeping and a bookkeeper as follows:

"BOOKKEEPING: Art or practice of keeping a systematic record of business transactions, to show their relations and the state of the business; art of keeping accounts."

"BOOKKEEPER: One who keeps accounts; one whose business or profession is bookkeeping."

The same dictionary, at page 16, also defines accounting and an accountant as follows:

"ACCOUNTING: The art or system of making up or stating accounts; the body of scientific principles underlying the keeping and explanation of business accounts. The application of such principles in practice; an instance of applying such principles; the act of stating accounts."

"ACCOUNTANT: One who is skilled in, keeps, or adjusts, accounts; an officer who has charge of the accounts in a public office."

The main difference, therefore, between an accountant and a bookkeeper seems to be that of degree. A bookkeeper is principally engaged in recording the daily transactions of a business in a formal and established set of books; i. e., the keeping of the journals and ledgers, and memoranda records such as the receiving records, shipping records, etc. Also as a part of his duties, he usually furnishes or makes a routine statement or trial balance as taken from said books showing the financial condition of the business. It has been authoritatively said that bookkeeping is a kind of shorthand in which the history of the business entity is recorded. Thus, a bookkeeper is mainly a recorder.

Accounting, on the other hand, suggests and requires more initiative. It is the function of the accountant to design and install the bookkeeping system, as well as the accounting system of a business, and to plan the bookkeeping and office procedure as well. He also audits the books kept by the

bookkeeper and furnishes the necessary financial statements and information concerning the financial condition of the business. From the books and other matter furnished him, he analyzes and interpretes the financial condition of the business, and if need be, suggests methods of improving it. The bookkeeper does not perform any of these functions; if he does render any of such services, he ceases to be just a bookkeeper and becomes an accountant.

From your request, it is not clear what specific services the "so-called bookkeepers" mentioned by you are performing for their employers or clients. Each of these cases will have to be decided in accordance with the specific facts involved.

Summarizing, it makes no difference whether these people refer to themselves as bookkeepers or accountants. The governing factor is the actual services which they are performing.

If they furnish only the services of a bookkeeper; that is, if their activities are confined to bookkeeping an established set of books, and in furnishing in connection therewith routine financial statements, then it is my opinion that they would not be liable for the license under Section 453, *supra*.

This seems particularly true due to the obvious distinction between a bookkeeper and an accountant, and the fact that a bookkeeper is not specifically mentioned in the license statute. The general rule of construction is that where a taxing statute is ambiguous or where there is substantial doubt as to whether a person is included within the meaning of the statute, then such doubt is to be resolved in favor of such person, and not the taxing authority. Quarterly Report of Attorney General, Volume 34, page 20; *State v. Coastal Petroleum Corp.*, 240 Ala. 254, 198 So. 610.

From the definitions of an actuary and an auditor, it would also clearly appear that a bookkeeper, as has been herein defined, would not fall within either of such categories.

Very truly yours,

SI GARRETT

Attorney General

June 23, 1952

Hon. J. J. Tisdale, President

Board of Revenue

Covington County

Andalusia, Alabama

Counties — Covington County — Roads and Bridges.

A county governing body, in its discretion, may purchase automobiles for the use of the members of said county governing body for the purpose of inspecting roads and bridges of the county, and may pay for the same out of the county's revenue from gasoline taxes.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated March 29, 1952, is as follows:

"As president of the Covington County Board of Revenue and under authority of Title 55, Section 240 of the 1940 Code of Alabama, I respectfully request an opinion of you on the following question:

"Can the Board of Revenue of Covington County legally purchase, with County funds, an automobile for each of its members, same to be used by the members in the performance of their duties as such members?

"Your attention is called to the local act governing the Board of Revenue of Covington County as found in the local acts of 1945, page 23 to 29; also to an opinion by the Attorney General to Hon. Henry W. Smith, found in Volume 63 of the Quarterly Report of the Attorney General, page 9."

In my opinion, the Board of Revenue of Covington County is authorized to purchase an automobile for each member of said board, to be used by the members in the performance of their duties in connection with the public roads of the county.

The local act to which you refer, Act No. 22, Local Acts 1945, page 23, establishes a governing body for Covington County, which has all the powers, duties, and responsibilities imposed upon county governing bodies by the general laws of Alabama, Section 20 of Act No. 22, supra. Such governing bodies, under the general law, have plenary jurisdiction over the establishment and maintenance of roads and bridges within the county, and it is the duty of the members of such governing bodies to inspect the roads and perform other duties in connection with the public roads.

It is my opinion, therefore, that, in its discretion, the governing body of Covington County, as now constituted, may purchase an automobile if such equipment is thought necessary for the use of each member of the board.

Of course, these automobiles must be used solely in the performance of the duties of the members of the board. These automobiles may be purchased out of the revenues from the gasoline tax not otherwise appropriated. See *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, 71 So. 704, and Quarterly Report of Attorney General, Vol. 63, page 9.

Yours very truly,

SI GARRETT

Attorney General

June 25, 1952

Hon. W. G. Pruett

State Highway Director

Montgomery, Alabama

Highways and Highway Department — Funds.

1. If at the end of the Federal fiscal year (June 30) for which Federal funds are made available, a county has not completed all the steps necessary to receive its allotment of Federal funds for secondary roads for the particular fiscal year, such Federal secondary aid funds immediately to the State Highway Department for matching and for use on the State-Federal Aid System.

2. Even though said Federal funds for secondary roads revert to the State Highway Department, under the provisions of Section 13 of the Farm-to-Market Road Act, as amended, said funds may be allotted by the Highway Department to the county.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 12, 1952, is as follows:

"The Alabama Farm-to-Market Road Act states in part as follows:

"Of the federal aid moneys allocated to Alabama for secondary, farm-to-market roads, **subject to being in conformity with the federal rules and regulations**, the State Highway Department will allot to each county an amount equal to 1/67 of \$2,500,000, such federal aid in the event the federal aid allotted to the State for all purposes shall be less than \$5,000,000 in any one fiscal year, the amount allotted to each county shall be reduced to 1/67 of 1/2 of the total amount allotted to the State to be matched by the state and county, share and share alike, from state-county funds provided in this article. Any amount of federal funds not matched in this manner during the federal fiscal year they are made available, will revert to the State Highway Department for matching on the state-federal aid system."

"Public Law 769 of the 81st Congress, Section I, paragraph (c), states in part as follows:

"Any sums apportioned to any State under the provisions of this section shall be available for expenditure in that State for two fiscal years after the close of the fiscal year for which sums are authorized, and any amount so apportioned remaining unexpended at the end of such period shall lapse: Provided, that such funds for any fiscal year shall be deemed to have been expended if a sum equal to the total of the sums apportioned to the State **for such fiscal year is covered by formal agreements with the Commissioner of Public Roads for the improvement of specific projects as provided by this Act.**"

"The formal agreement with the Commissioner of Public Roads for the improvement of specific projects as provided by the Act, is known as

a project agreement. In order to execute a project agreement, the following general requirements are necessary:

1. The project be located on the Federal-aid System.
2. The project be on an approved Federal-aid program.
3. Plans and surveys must be completed for the project.
4. The project must be either contracted for through a private contractor or contracted for between the Bureau of Public Roads and the State and/or County through agreed unit prices.
5. The project agreement must be drawn up for a specific sum, stating the amount of the State matching fund and the amount of the Federal-aid matching fund.
6. A project agreement must be signed by the appropriate Federal authorities and the appropriate State authorities.

"Your official opinion is requested concerning the following question:

"If, at the end of the Federal fiscal year for which Federal funds are made available, a County has not completed all the steps necessary to get its allotment of Federal funds for the particular fiscal year under Federal project agreement, do the funds revert immediately to the State Highway Department for matching and for use on State Federal Aid System?"

Your inquiry is answered in the affirmative; that is to say, if at the end of the Federal fiscal year, June 30, 1952, a county has not completed all the steps necessary to receive its allotment of Federal funds for the particular fiscal year, then the funds immediately revert, on July 1, 1952, to the funds of the State Highway Department, which department may then use such funds for matching on the State-Federal Aid System.

A similar inquiry was made to this office and answered under date of August 4, 1948. The opinion appears in Quarterly Report of Attorney General, Volume 52, page 105. There, this office held that the State grant to the counties, in the amount of \$2,500,000, provided for in Section 13 of the Farm-to-Market Road Act of 1943 (Act No. 329, General Acts 1943, page 311, as amended by Act No. 41, General Acts 1945, page 47, and Act No. 441, General Acts 1947, page 321), reverted to the general funds of the State Highway Department (public road and bridge fund) immediately after the expiration of one year provided for in said Section 13, as amended, supra. This opinion further held, however, that even though the State funds granted to the counties respectively for a period of one year reverted at the end of that one year, nevertheless, the Highway Department could retain and prorate, after the one year period and after the reversion, each county's pro rata share of the State's grant, so that the county could receive full benefit and use its pro rata share of the State grant to match Federal funds in order to initiate the farm -to-market road program.

A similar conclusion is reached in connection with your present inquiry. Section 13, as amended, supra, which, in pertinent part, is quoted in your inquiry, provides that each county shall receive each year 1/67 of 2½ million dollars or 1/67 of one-half of those funds allotted to Alabama for secondary

farm-to-market roads out of the Federal treasury. The obvious purpose of this provision of Section 13, as amended, *supra*, was to guarantee to each county for a certain period of time the opportunity to share equally with other counties in Alabama a certain amount of Federal funds allocated to Alabama for secondary highway construction. The time limit which Section 13, as amended, *supra*, sets within which the county must comply and accept its allotment is "during the Federal fiscal year they (the Federal secondary funds) are made available."

In Public Law No. 769, 81st Congress, Second Session 1950, referred to in your inquiry, Federal aid secondary funds are authorized to be appropriated for the fiscal year ending June 30, 1952, and for the following fiscal year. Therefore, the Federal aid secondary funds were made available for the entire Federal fiscal year beginning July 1, 1951, and ending June 30, 1952. It is my opinion that this period of time is the Federal fiscal year that such funds were made available, and that the county must accept the funds within that time or else the funds will revert to the State Highway Department in accordance with Section 13, as amended, *supra*.

It is clear that the Federal aid funds for secondary roads made available for the Federal fiscal year ending June 30, 1952, will be available to the State for two additional years, that is, until June 30, 1954. Public Law 769, *supra*, Section 1 (c).

Some may contend that these Federal funds should be available to each county for the entire time that such funds are available to the State of Alabama. I do not believe, however, that this is a proper construction of Section 13, as amended, *supra*, for the reason that said Section 13 specifically provides for a revision of said funds to the State Highway Department for matching on the State-Federal Aid System. Of course, such a provision indicates that the Legislature intended that if the county did not take advantage of its rights to receive an allotment of 1/67 of one-half of Federal secondary funds, then the Highway Department would have an additional period within which to match and use said funds.

It should be added that, even though the county does not accept the funds during the Federal fiscal year which said funds are made available, the Highway Department, even after the expiration of that time, may allow the allotment to be made to the county as long as said Federal funds are available to the State of Alabama. Quarterly Report of Attorney General, Vol. 52, page 105.

Yours very truly,

SI GARRETT

Attorney General

June 27, 1952

Hon. William M. Kelly

City Attorney

Veterans Administration

400 Lee Street

Montgomery 4, Alabama

Guardian and Ward — Veterans — Sheriffs — Opinions Modified.

1 The provisions in Title 21, Section 162, Code of Alabama 1940, limiting to five the number of veteran wards for whom a guardian may serve, are not applicable to the general guardian of the county or the sheriff when acting as such.

2. Quarterly Report of Attorney General, Vol. 64, page 65, modified.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

In your letter to this office, under date of February 5, 1952, and other correspondence, you have requested that this office reconsider an opinion rendered under date of September 29, 1951, to Hon. Walter F. Gaillard, Judge of Probate, Mobile County, found in Quarterly Report of Attorney General, Vol. 64, page 65.

On reconsideration of this opinion, I find that the opinion should be modified.

The opinion referred to above holds that a person appointed as general guardian for a county may act as guardian for only five veterans under the Veterans' Guardian Laws (Title 21, Sections 160-176, Code of Alabama 1940), although such person may act for an unlimited number of other wards. This opinion was based upon a construction of Title 21, Section 162, Code of Alabama 1940, which provides, in part, as follows:

"Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards"

It is clear that the wards referred to in Section 162, *supra*, are wards who are beneficiaries of the United States Veterans Bureau, or its successor. Section 160, *supra*. It is now my opinion that Section 162, *supra*, in limiting to five the number of veteran wards for whom a guardian may serve, does not apply to a general guardian of the county (Title 21, Section 7, Code of Alabama 1940), nor does said Section 162, *supra*, apply to the sheriff when said sheriff is acting as general guardian (Title 21, Section 24, Code of Alabama 1940).

Although the provisions of Section 162, *supra*, are clear in limiting to five the number of wards for whom a person may serve as guardian when the ward is a veteran and a beneficiary of the United States Veterans Bu-

reau, or its successor, it is my view that the limitation applies to guardians other than the general guardian, or the sheriff when acting as a general guardian of the county. Any other result would lead to a hardship on the veteran for whom no person appeared to be appointed as guardian.

When the Legislature enacted Section 162, *supra* (Act No. 240, General Acts 1931, page 280), the laws authorizing the appointment of general guardians for the county (Section 7, *supra*), and the law requiring the sheriff to be appointed when there is no general guardian and no other person applies for guardianship (Section 24, *supra*) had been in several previous Codes of Alabama. These statutes allowing the appointment of a general guardian and requiring the sheriff to act as general guardian when no other guardian can be found, were no doubt enacted so that no person of unsound mind, or who was otherwise incompetent to act for himself, would ever be without a guardian to act for him.

It is my view that when Section 162, *supra*, was enacted, the Legislature contemplated that in the case of veterans there would always be some person who would apply and be appointed as guardian. The Legislature wisely provided that no guardian could serve more than five veteran wards. No doubt, this provision was to prevent one guardian from serving so many veteran wards that he was unable to give them the attention which they required. As a matter of fact, I am informed that today it is becoming more difficult to find persons who will serve as guardians for veteran wards. In some cases, no individual may appear and apply to be a veteran's guardian. Under such circumstances, it is my opinion that the court may appoint the general guardian of the county, or the sheriff, to act for the veteran ward, and that such general guardian, or the sheriff, when acting as general guardian, may act for any number of veteran wards. Otherwise, veterans for whom no individual appeared to be appointed as guardian would be without a person to represent him and protect his rights.

You are, therefore, advised that Section 162, *supra*, does not limit the number of veteran wards for whom the general guardian of the county, or the sheriff when acting as such, may serve.

Yours very truly,

SI GARRETT

Attorney General

June 27, 1952

Hon. William M. Kelly

Chief Attorney

Veterans Administration

400 Lee Street

Montgomery 4, Alabama

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"Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards"

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When the Legislature enacted Section 162, *supra* (Act No. 240, General Acts 1931, page 280), the laws authorizing the appointment of general guardians for the county (Section 7, *supra*), and the laws requiring the sheriff to be appointed when there is no general guardian and no other person applies for guardianship (Section 24, *supra*) had been in several previous Codes of Alabama. These statutes allowing the appointment of a general guardian and requiring the sheriff to act as general guardian when no other guardian can be found, were no doubt enacted so that no person of unsound mind, or who was otherwise incompetent to act for himself, would ever be without a guardian to act for him.

It is my view that when Section 162, *supra*, was enacted, the Legislature contemplated that in the case of veterans there would always be some person who would apply and be appointed as guardian. The Legislature wisely provided that no guardian could serve more than five veteran wards. No doubt, this provision was to prevent one guardian from serving so many veteran wards that he was unable to give them the attention which they required. As a matter of fact, I am informed that today it is becoming more difficult to find persons who will serve as guardians for veteran wards. In some cases, no individual may appear and apply to be a veteran's guardian. Under such circumstances, it is my opinion that the court may appoint the general guardian of the county, or the sheriff, to act for the veteran ward, and that such general guardian, or the sheriff, when acting as general guardian, may act for any number of veteran wards. Otherwise, veterans for whom no individual appeared to be appointed as guardian would be without a person to represent him and protect his rights.

You are, therefore, advised that Section 162, *supra*, does not limit the number of veteran wards for whom the general guardian of the county, or the sheriff when acting as such, may serve.

Yours very truly,

SI GARRETT

Attorney General

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